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No. 79-1676

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

ALAN J. WHITE,

Petitioner,

v.

ARLEN REALTY & DEVELOPMENT CORP.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ALAN J. WHITE
8201 Snug Hill Lane
Potomac, MD 20854

Petitioner,
in propria persona

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Alan J. White, in propria persona, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals") entered in this proceeding on January 29, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals (1a - 5a) is reported at ___ F.2d ___. The Oral Opinion (2/25/77)(6a - 15a), Order (2/25/77)(16a - 17a),

Memorandum and Order (4/6/77)(18a - 22a) and Memorandum and Order (4/15/77)(23a - 24a) of the United States District Court for the District of Maryland ("District Court") are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 29, 1980 (1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. When a successful private attorney general under the Truth in Lending Act challenges the reasonableness of an attorney's fee for his own services included by the trial court in his award, and the unsuccessful creditor chooses not to challenge the private attorney general's entitlement to that attorney's fee, does a court of appeals have subject matter jurisdiction over

the private attorney general's entitlement to that attorney's fee ?

2. Does the Truth in Lending Act require an award to a successful private attorney general to include "a reasonable attorney's fee" regardless of the litigant's status as an attorney and regardless of his representation by another attorney ?

STATUTORY PROVISION INVOLVED

15 U.S.C. § 1640(a) provides, in pertinent part,

> ". . . [A]ny creditor who fails to comply with any requirement imposed under this part . . . with respect to any person is liable to such person in an amount equal to the sum of -
>
> (1) any actual damage sustained by such person as a result of the failure;
>
> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction . . . except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000 . . . [and]
>
> (3) in the case of any successful action

to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court."

STATEMENT OF THE CASE

The petitioner, Alan J. White ("White"), is a member of the bar of this Court who, in 1972, initiated several lawsuits under the Truth in Lending Act against certain issuers of credit cards held by him, including the respondent, Arlen Realty & Development Corp. ("Arlen"), who, at that time, owned and operated Korvettes Department Stores. White initiated the litigation for the purpose of causing his creditors to bring their billing and related practices into compliance with that Act and, in particular, to require them to provide proper identification of goods and services purchased so that White (and others) could ascertain more easily whether he was being billed solely for his own purchases.

White had been a trial attorney in the Eastern District of Pennsylvania in the 1957-61 period. Since he had court experience, and, particularly, since there was nothing personal about the issue of whether Arlen was complying with the Truth in Lending Act, White chose to conduct his own litigation. But since he conducted this litigation out of his home, delays and other problems associated with the completion of a new home in mid-1973 left him without a place to work for a sufficient period of time that he was unable to prepare for a pre-trial conference in September 1973. White attempted to explain the situation to the District Court, but apparently that Court would not accept the fact that that was a time in White's life that he simply could not arrange his other affairs to suit the convenience of the Court.

From that point forward, the District Court did everything in its power to attempt to force White, first, to surrender his civil right under

28 U.S.C. § 1654 to conduct his own litigation, and second, to engage an attorney to represent him. When White complained that it would be impossible for him to meet a certain time schedule that was later established, the District Court seized upon the opportunity to admonish him that preparation for court takes precedence over personal affairs, and then proceeded to change the time schedule. Ultimately, the District Court accused White of being motivated by personal considerations, rather than a desire to serve as a private attorney general, and utilized that accusation as a footnote reason for denying White's claim on the merits. 347 F.Supp. at 157, n. 5. White was able to prove that his motive in serving as a private attorney general was pure, and he introduced evidence in the record to prove that fact. Thereafter, the Court of Appeals reversed the District Court on the merits and remanded the case for a determination of a reasonable attorney's fee. And in fixing that

fee, the District Court mischaracterized and generalized from the specifics, and (at 12a-13a) considered White's disproved "suspect" motive as a litigant, to reach the conclusion (at 11a) that White's performance as an attorney was well below average.

White was thus forced to perform in a court in which he resolved a discovery dispute with Arlen that was reduced to writing and signed (and thereby approved) by the District Court; but when Arlen failed to perform as promised and White sought to enforce the agreement several times, the District Court would not require Arlen to comply and thereby reneged on its approval. Furthermore, White informed the District Court that he wanted to dispose of the litigation through a motion for summary judgment after the completion of discovery, but the District Court forced him to go to trial. And, ultimately, the District Court took charge of the trial to the end that White and Arlen were forced to stipulate

to White's case, but Arlen was permitted to put on the case it wanted.

The District Court reserved judgment and, on April 18, 1974, it decided on its own initiative (which issue had not been raised or briefed) that White did not have standing to sue, and, in any event, that Arlen's identifications of goods and services were sufficicnt under the Act. 374 F.Supp. 151. 1/

The combination of (1) discussing virtually everything except the principal issue, (2) basing a decision partly on an issue that had not been raised or briefed, and (3) leveling a personal attack on his integrity, caused White to lose his objectivity for the time being. Accordingly, after the District Court denied rehearing, White engaged Steven A. Skalet, Esquire

1/ The District Court devoted only one sentence to the principal issue, stating, 374 F.Supp., at 160, "This Court concludes /without stating why/ that the terminology used by defendant here was not insufficient either as a matter of law or under the particular facts of this case."

("Skalet"), to represent him on appeal. And White turned over his work product to Skalet and otherwise assisted him in prosecuting the appeal, including the prompt payment of all expenses. Although Skalet was the principal draftsman of the brief, he molded his arguments on White's petition for rehearing. Furthermore, White assisted Skalet on the brief, but Skalet failed to include White's name on the brief, as promised.

On December 11, 1975, the Court of Appeals sided with the position White had taken from the beginning of the litigation that as a matter of law Arlen was not complying with the Truth in Lending Act, and, therefore, it reversed the District Court. 540 F.2d 645. White thus became a successful private attorney general, and the Court of Appeals remanded the litigation to the District Court with instructions that reasonable attorney's fees be awarded.

On Skalet's advice, based principally on the District Court's attack on White's integrity,

White permitted Skalet to handle the petition for attorney's fees, and provided Skalet with a copy of a brief on the subject that he (White) had used successfully once before. The brief took the position that an award of an attorney's fee is mandatory under the Truth in Lending Act and only the amount is discretionary, and that the amount awarded is the property of the successful private attorney general rather than that of the attorney.

White also provided Skalet with all of the information requested by him with respect to time expended in the litigation, and similar matters, and Skalet prepared and filed a petition and affidavit for a fee for White's services.

Unknown to White, and notwithstanding that White had made known to Skalet his (White's) position that the amount awarded is the property of the party, and notwithstanding that an attorney cannot properly and ethically settle any part of his client's litigation without the knowledge and consent of his client, Skalet entered into the

following undated stipulation with Joel M. Wolosky, Esquire ("Wolosky"), counsel for Arlen (which is reproduced in reduced size at 25a),

> "It is hereby stipulated by the parties, through counsel, that the amount of attorneys fees to be awarded to Steven A. Skalet for the representations of plaintiff Alan White subsequent to the trial in the United States District Court for the District of Maryland shall be $4,000.00, and that this sum is fair and reasonable compensation for counsel's efforts. This stipulation is not to be construed to release or waive plaintiff's application for costs, including the costs for appeal and for attorneys fees for plaintiff's representation pro se in the District Court."

Skalet was supposed to petition the District Court to fix attorney's fees for his services as well as White's services, and explain to that Court the relative contributions of both attorneys to the final result. He did not do so, and, in particular, he did not inform the District Court of the help he received from White. Instead, when Skalet presented the petition and affidavit to the District Court he had a secret interest that conflicted with

his obligation to obtain the best possible fee for White's services. The District Court would have to hold down the amount of the fee for White's services if it thought the total fee for Skalet's and White's services would be too high. See 1Ca, for the District Court's expression of concern with respect to the total fee.

In White's absence (on Skalet's advice to stay away in the light of the District Court's attack on White's integrity), the District Court issued an oral opinion on February 25, 1977, holding in favor of White and against Arlen on the question of whether White was entitled to an attorney's fee for his representation pro se. But in view of the improper stipulation "by the parties, through counsel", the District Court awarded $4,000 for Skalet's 90 hours of work in conjunction with the appeal and the petition for attorney's fees, or about $45 per hour, and only $750 for White's 190 hours of work through the trial, or about $4 per hour.

The District Court's procedure in issuing an oral opinion in White's absence and entering judgment at the same time, impeded White's ability to analyze critically its rationale. The effect of such action was to cause the 10-day period for filing a motion pursuant to Rule 59(e) to alter or amend judgment, and for filing a motion pursuant to Rule 52(b) to amend or make findings, to begin running, which period cannot be enlarged because of Rule 6(b). White could not obtain a copy of the transcript of the oral opinion within the 10 days and, therefore, he had no opportunity to analyze it and cause the record to be enlarged by additional materials that might explain or rebut the District Court's statements and rationale.

Skalet filed a timely motion to alter or amend the judgment together with an affidavit that was prepared by White on the basis of what Skalet told him about the oral opinion. After that motion was denied on April 6, 1977, White

took the reins of the litigation back and moved for an extension of time to plead to the District Court's Memorandum and Order of April 6, 1977, to two weeks after service on him of a transcribed copy of the oral opinion of February 25, 1977 (see 19a, where the District Court said that its oral opinion "has now been transcribed"). White said that no party should be required to plead to an oral opinion, and that when a court issues an oral opinion due process requires that litigants be given a reasonable period after service of a transcribed copy of the opinion for filing a responsive pleading.

There is a subtle misstatement of a material fact in the Court of Appeals' opinion, in this connection, at 2a, where that Court states that White claimed that the District Court erred in not allowing him to supplement his affidavit "after receipt of the hearing transcript." The claim was, and is, that the District Court erred

in not allowing him to supplement his affidavit after receipt of the transcript of the oral opinion.

White's motion for an extension of time was denied on April 15, 1977, and he appealed, claiming (1) that the District Court's award of a $750 attorney's fee for his 190 hours of work was both arbitrary and not "reasonable" within the meaning of 15 U.S.C. § 1640(a)(3); (2) that the District Court's award was based in part upon incorrect and off-the-record information, and (3) that the District Court denied the petitioner due process insofar as its procedure denied him a fair opportunity to provide record support for modification of his award on appeal.

Although White appealed the reasonableness of the $750 included in his award as an attorney's fee for his services, Arlen did not cross-appeal White's entitlement to that amount. Arlen filed

its brief on January 30, 1978, 2/ arguing that the Court of Appeals should affirm the District Court. A week later, on February 6, 1978, Arlen filed a motion for summary dispostion of the appeal stating that the issue of White's entitlement to an attorney's fee "resolved in White's favor by the district court . . . is not contested on this appeal [Emphasis added]."

A year later, in February 1979, the Senior Deputy Clerk advised the parties by letter that the Court of Appeals desired supplemental briefing on the question of "Whether or not a lawyer proceeding pro se is entitled to counsel's fee under 15 U.S.C. 1640(a)(3)." Believing that the request came from a panel that had been laboring over the case more than a year, rather than one that had it only several weeks, White

2/ Briefing was thereby completed and the case should have been submitted to a panel of the Court of Appeals. But it was not submitted to a panel until January 10, 1979 (1a), a year later, and the Court of Appeals has refused thus far to inform the petitioner why.

wrote to the Senior Deputy Clerk on February 27, 1979, pointing out that the entitlement issue was not before the Court of Appeals, and inquiring whether that fact had been overlooked or whether the Court of Appeals was opening the issue. Arlen then filed a supplemental brief in which it changed its position to oppose a fee, and, to be on the safe side, White filed a supplemental reply brief. And by letter dated March 26, 1979, after the supplemental briefs had been filed, the Senior Deputy Clerk wrote to the parties that he was unable to respond to White's letter because he did not know why the Court of Appeals wanted the supplemental briefs, and that White's letter had been forwarded to the panel.

Nothing significant happened in the case for almost a year until January 29, 1980, when the Court of Appeals issued its decision which (1) opened the entitlement issue without having given the parties an opportunity to brief the question of whether it could on its own initiative open

that issue, and (2) decided the entitlement issue against the petitioner, against the plain meaning of 15 U.S.C. § 1640(a)(3), and against the clear interpretation of the Supreme Court that it is a mandatory provision.

REASONS FOR GRANTING THE WRIT

1. The Question of Subject Matter Jurisdiction

Mr. Justice Cardozo said in Morley Construction Co. v. Maryland Casualty Co., 300 U.S. 185 (1937), at 191,

> Without a cross-appeal, an appellee may "urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistance upon matter overlooked or ignored by it." United States v. American Railway Express Co., 265 U.S. 425, 435. What he may not do in the absence of a cross-appeal is to "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below." Ibid. The rule is inveterate and certain. [Nine citations omitted.] Findings may be revised at the instance of an appellant, if they are against the

> weight of the evidence, where the case is one in equity. This does not mean that they are subject to like revision in behalf of appellees, at all events in circumstances where a revision of the findings carries with it as an incident a revision of the judgment.

If the rule was "inveterate and certain" in 1937, it is even more so today as a result of numerous repetitions of Mr. Justice Cardozo's words by numerous courts.

The Fifth Circuit, for example, applied the rule in a challenge to the reasonableness of a $1,000 attorney's fee for 116 hours of work in Fain v. Caddo Parish Police Jury, 564 F.2d 707 (1977). The appellee in that case suggested in its brief that no attorney's fee award was in order, and the Fifth Circuit said, at 709, n. 3,

> Because the appellee did not appeal from the judgment below and improperly raised the issue for the first time in its brief[,] the question is not properly before this court. See Colvin v. Dempsey, 477 F.2d 1283 (5th Cir. 1973); United States v. Yorfino, 412 F.2d 329 (5th Cir. 1969).

In the latter case, United States v. Yorfino, the Fifth Circuit said, 412 F.2d, at 330, that in

the absence of a cross-appeal an appellee has no standing to contest the judgment of a district court. And in Duriso v. K-Mart No. 4195, Division of S.S. Kresge Company, 559 F.2d 1274 (1977), the Fifth Circuit equated Mr. Justice Cardozo's rule to the timely filing of a notice of cross-appeal under FRAP 4(a), which allows up to 14 additional days for that purpose.

In other words, a court of appeals has no authority to hear appeals not filed within the time limits set by FRAP 4(a). The District of Columbia Circuit said, in this connection, in Hodson v. United Mine Workers of America, 473 F.2d 118 (1972), at 124, n. 3, that the "/t/imely filing of a notice of appeal was mandatory and jurisdictional under old Rule 73(a), and it is under new Fed.R.App.P. 4(a). /Five citations omitted./" And the Eighth Circuit said in Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Kurtenbach, 525 F.2d 1179 (1975), at 1181, that "timely filing" under FRAP 4(a) "is a

jurisdictional prerequisite for subject matter appellate jurisdiction in the courts of appeal."

Similarly, the Fifth Circuit said in Williams v. United States, 553 F.2d 420 (1977), at 422,

> It has been authoritatively stated on numerous occasions that, unless appellants timely file a notice of review, a court of appeals has no jurisdiction over the case.

The Fifth Circuit cited eleven decisions in support of that proposition, including Merrill, Lynch, supra, and the Fourth Circuit's Morin v. United States, 522 F.2d 8 (1975), wherein the Fourth Circuit said, at 9, that in the absence of extraordinary circumstances, compliance with FRAP 4(b) is "mandatory and jurisdictional." Indeed, only 18 months ago, while White's appeal on the reasonableness of the $750 attorney's fee for his representation pro se was awaiting the decision of the Fourth Circuit, that Court acknowledged in Caperton v. Beatrice Pocahontas Coal Co., 585 F.2d 683 (1978), at 687, n. 6, that

> It is settled that the failure to timely file a notice of appeal deprives this court of

> jurisdiction to review the judgment or order with which the appealing party is dissatisfied. See Browder v. Director, 434 U.S. 257, 264, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978); Notes of Advisory Committee, Rule 3, Fed.R.App.P.

That Court also said, at 687, that it has "no . . . power" under FRAP 2 to suspend the rules to excuse a failure to comply with FRAP 4(a). See, also, Merrill, Lynch, supra, 525 F.2d, at 1182, wherein the Eighth Circuit said that the power to extend the time for appeals is vested solely in the district court, and that a "court of appeals may not enlarge the time for filing a notice of appeal."

The application of the foregoing principles to the instant facts wherein the petitioner, White, filed a timely notice of appeal, and the respondent, Arlen, did not file a notice of cross-appeal, requires the conclusion that the Fourth Circuit has subject matter jurisdiction to determine the reasonableness of the attorney's fee for White's representation pro se, but no subject matter jurisdiction to determine White's

entitlement to such a fee. The application of the foregoing principles requires the additional conclusion that that Court has no power to take an action which, in effect, would confer subject matter jurisdiction on itself to decide White's entitlement to the attorney's fee in question. As the Supreme Court said almost a century ago in Credit Card Limited v. Arkansas Central Railway Company, 128 U.S. 258 (1888), at 261,

> When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter.

While the District Court decided the entitlement issue in White's favor on February 25, 1977, the Fourth Circuit decided on January 29, 1980, that White is not entitled to an attorney's fee because he was not represented by an attorney - presumably meaning an attorney other than himself. Arlen stated, in this connection, in its letter to the Fourth Circuit Clerk dated February 11, 1980, that that Court reversed the $750 judgment

"on the ground that a lawyer proceeding pro se is not entitled to an award of attorney's fees" under the Truth in Lending Act, thereby agreeing with White that the Fourth Circuit's decision is bottomed on the entitlement issue.

The petitioner respectfully suggests that the Court of Appeals' action opening the entitlement issue on its own initiative, effectively requires the respondent to attack the judgment of the District Court with a view toward lessening the petitioner's recovery thereunder, in violation of the principle announced in 1924 by Mr. Justice Brandeis in United States v. American Railway Express Co., 265 U.S. 424, at 435, and clarified in 1937 by Mr. Justice Cardozo in Morley Construction Co., supra, 300 U.S., at 191. The petitioner respectfully suggests, additionally, that the Court of Appeals' action violates the long-standing principle that the time for taking an appeal cannot be enlarged by a simple order of court.

And the petitioner respectfully submits for the foregoing reasons that the Court of Appeals does not have subject matter jurisdiction to decide whether he is entitled to the inclusion in his award of an attorney's fee for his own services, and, consequently, that the Court of Appeals did not have authority to reverse part of the judgment of the District Court on the ground that "the provisions of § 1640(a)(3) will not be interpreted to allow attorney fees and expenses to plaintiffs who are attorneys and represent themselves." Under these circumstances, the petitioner suggests that it would be appropriate to summarily reverse the decision of the Court of Appeals with instructions to promptly decide the issues that are properly before that Court.

2. The Private Attorney General Question

The Truth in Lending Act does not say that the unsuccessful creditor is liable for the

successful private attorney general's legal fees, or even for any attorney's fee. It says that the creditor is liable to the successful debtor "IN AN AMOUNT EQUAL TO THE SUM OF --". And then it specifies the components of that sum of money:

(1) Actual damages, plus

(2) $100 to $1,000 (in the case of an individual action as distinguished from a class action), plus

(3) Costs, together with a reasonable attorney's fee.

The distinction between an award of an attorney's fee, and an award of a sum of money which is measured in part by "a reasonable attorney's fee", is both subtle and significant. A substantial number of Congressmen are lawyers, and they should know that it is improper to pay attorneys' fees to, or share them with, laymen. To avoid such a result, they said in the Truth in Lending Act that the successful private attorney general shall recover "an amount equal

to . . . a reasonable attorney's fee."

Congress knows how to regulate the fee relationship between an attorney and his client, if it so chooses. The Federal Tort Claims Act, for example, provided at 28 U.S.C. § 2678 (before the 1966 amendment) that the court "may . . . allow reasonable attorney fees . . . to the attorneys representing the claimant." (Emphasis added.)

The Truth in Lending Act does not regulate the fee relationship between an attorney and his client. It provides that the successful plaintiff shall recover "an amount equal to . . . a reasonable attorney's fee". If the amount so awarded is in fact an attorney's fee, and if it is more than the fee actually paid by the plaintiff to his attorney, or if there is no fee, the award would result in an improper sharing of an attorney's fee with a layman, or the improper payment of such a fee to a layman, unless the plaintiff to whom the award is made happens to

be an attorney. If the amount so awarded is in fact an attorney's fee, and if it is equal to or less than the fee actually paid, there would still be a technical violation in that the fee would go to the layman before it is turned over to the attorney.

If, on the other hand, the amount so awarded is not an attorney's fee, then it is not improper for a non-attorney-plaintiff to share or keep that amount, or even to receive it before paying it to his attorney. The Court should interpret the Truth in Lending Act in a manner to avoid any improper sharing or payment of attorneys' fees, particularly since Congress provided for an award directly to the plaintiff and did not regulate the fee relationship between the plaintiff and his attorney.

That is precisely why the Ninth Circuit erred in Hannon v. Security National Bank, 537 F.2d 327 (1976), cited by the Court of Appeals. The Ninth Circuit said,

> The only federal case we have found on this issue held that a layman representing himself may not recover under a general statute (Rev. Stat. §§ 823, 824) providing for the allowance of compensation to "attorneys, solicitors, and proctors in the courts of the United States." Gorse v. Parker, 36 F. 840 (C.C.N.D.Ill. 1888)." (Emphasis added.)

The Ninth Circuit obviously failed to distinguish between a statute, such as the one cited, providing for compensation to an attorney, and a statute such as the Truth in Lending Act providing for liability to a litigant for a sum of money which is measured in part by the court's judgment as to what a reasonable attorney's fee would be. If the purpose of including such a sum is to make the litigant whole and to facilitate private enforcement of the Truth In Lending Act, as the Ninth Circuit acknowledged, then the sum should go to and remain with the litigant if he expended his own time and energy, or go to the litigant and then to his attorney if he made a financial expenditure for an attorney's time and energy. The Court of Appeals' "fee generation"

issue (3a and 4a) is a "red herring" because, as acknowledged by the District Court (20a), White did not keep time records until 1974 "because he was not focusing on supplying a justification for legal fees".

The ultimate proof of the Ninth Circuit's error is in the footnote where it states,

> /W/here the assistance of an attorney is a practical necessity, Congress did not intend that vindication of the rights guaranteed by statute depend on the plaintiff's having economic resources to retain an attorney or else being compelled to seek out charitable assistance. The payment is made not to the litigants, but directly to the attorney as reimbursement for services actually rendered.

Obviously, the Ninth Circuit was not familiar with Block v. Gates, 68 A. 2d 898 (1949), in which the Municipal Court of Appeals for the District of Columbia held that "an attorney's fee allowed under a statute not providing specifically that it go to the attorney is an allowance to the party and not to the attorney. . . ." (Emphasis added.) And obviously the Ninth Circuit could not have known that two years later, in

Smith v. South Side Loan Company, 567 F.2d 306 (1978), the Fifth Circuit would decide under the Truth in Lending Act, at 307, that "an award is the right of the party suing /and/ not the attorney representing him." In any event, the Ninth Circuit's statement that payment under the Truth in Lending Act is not made to the litigant, is clearly incorrect.

Section 1640(a) says that "any" creditor -- not just some creditors -- "any" creditor who fails to comply with "any" requirement -- again, not just some requirements -- with respect to "any" person -- once again, not just some persons -- "is" liable -- not, "may be" liable -- "to such person" -- which proves the Ninth Circuit wrong -- in an amount equal to the specified sum.

And subsection (3) says that the specified sum is measured by the costs of the action /and a reasonable attorney's fee -- in the case of "any" successful action -- not just those in which the plaintiffs have engaged attorneys -- and not just

those in which the plaintiffs are, or are not, themselves attorneys.

In combination, all of the key words of Section 1640(a)(3) establish that the liability for the sum which is measured in part by a reasonable attorney's fee is mandatory "in the case of any successful action". The plain language leaves no room for any exceptions. Only the amount is discretionary with the court.

That is precisely why the Fifth Circuit was correct in saying in Sellers v. Wollman, 510 F.2d 119 (1975), at 123,

> If the district judge determines that Wollman and Tri-State violated the Truth-in-Lending Act, plaintiffs should not be denied attorney's fees because their attorney was employed by a legal aid society. Sec. 1640(a)(2) [now 1640(a)(3)] directs their award, and such an award is not contingent upon an obligation to pay an attorney, or the fact that no fee was charged. Thompson v. Madison County Board of Education, 5 Cir. 1974, 496 F.2d 682; Fairley v. Patterson, 5 Cir. 1974, 493 F.2d 598; Miller v. Amusement Enterprises, Inc., 5 Cir. 1970, 426 F.2d 534. See also Jones v. Seldon's Furniture Warehouse, [E.D.Va. 1973, 357 F.Supp. 886].

And that is precisely why the Third Circuit was correct in saying in Manning v. Princeton Consumer Discount Co., Inc., 533 F.2d 102 (1976), at 106,

> The Act does not make the award contingent upon the plaintiff's obligation to pay her attorney or whether a fee in fact was charged.

And that is precisely why the Third and Fifth Circuits are in harmony, and the Fourth Circuit is out of harmony, with the Supreme Court which also reached the conclusion in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), at 261, n. 34, that the Truth in Lending Act is mandatory in terms of awarding attorney's fees. Indeed, the Supreme Court repeated the same message directly to the Fourth Circuit in Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978), at 415, n. 5, but apparently the Fourth Circuit believes that there are some situations in which attorney's fees are not required.

It is apparent (to the petitioner, in any event) that the Court of Appeals opened the entitlement issue on its own initiative and decided it against the petitioner, against the plain meaning of 15 U.S.C. § 1640(a)(3), and against the clear interpretation of the Supreme Court, because the Court of Appeals wanted to avoid a decision on the merits of the issues before it. The petitioner's brief to the Court of Appeals contains the balance of the information that he would have included in a supplemental affidavit if the District Court had held the record open for a reasonable period after he received a transcribed copy of the District Court's oral opinion of February 25, 1977. It also contains a suggestion and request under FRAP 10(e) to enlarge the record to permit such information in. Thus, the Court of Appeals was caught in the dilemma, in the petitioner's view, of permitting the clearly outrageous procedure of the District Court to stand, or letting in and

considering the petitioner's answers to the District Court's charges against him.

And there <u>are</u> answers, some of which relate to the fact that when Skalet prepared White's first affidavit, he (Skalet) did not see fit to include certain details that the District Court later said were lacking and should have been included. For example, the District Court said, at 12a, that the petitioner's time records would appear to overstate at least some of the time spent on this case, as, for example, the 4½ hours and 3 hours, respectively, for status conferences on February 1 and 28, 1974, and the 10 hours for the trial on March 21, 1974. White responded in his brief to the Court of Appeals:

> On February 1, 1974, Judge Harvey directed the Plaintiff to return to the Defendant's Baltimore counsel's office to finalize the Trial Order; and the 4½ hours which the Plaintiff claims for that date consists of one hour in conference with Judge Harvey, one and one-half hours at the Defendant's counsel's office, and one hour for travel in each direction. Similarly, the three hours on February 28, 1974, includes one hour in conference and two hours for travel. And whatever figures Judge Harvey

> relied upon with respect to the trial, the transcript of the trial shows that it began at 10:00 a.m. and ended 7 hours and 20 minutes later at 5:20 p.m. The Plaintiff allowed more than one hour for travel prior to the trial for set-up time which, together with the travel after the trial, results in a reasonable 10 hours, as claimed. (3/7/77 affidavit, pages 9-10.)

Later, the petitioner explained that Skalet had not broken out travel time because the case had been moved from the District of Columbia to the District of Maryland for the respondent's convenience, which forced the petitioner to travel back and forth between Washington and Baltimore, and it was the petitioner's position that he should be compensated for that travel time (and those travel expenses) the same as any other time during which he performed legal services.

While it is not the purpose of this petition to argue the merits of the issues before the Court of Appeals, a few key points should be observed.

The District Court's charges that White performed incompetently are designed to mask the fact that one could slip virtually any number of

dollars into the District Court's oral opinion without changing a thing. One could slip $100 into the opinion as a "reasonable" attorney's fee, or use the $750 actually allowed, or use $5,000 or many other figures, and arguably they would all be "reasonable". The reason is because there is no nexus between some number of hours allowed (the District Court never specified an allowable number) and some rate per hour, to arrive at a total fee. And, as a result, the District Court's decision that $750 was "reasonable" was arbitrary.

The Supreme Court is recommended, in this connection, to Postow v. Oriental Building Association, 455 F.Supp. 781 (1978), wherein the United States District Court for the District of Columbia articulated "reasonable" attorney's fees under the Truth in Lending Act in a proper manner. 3/

3/ The case has more significance than illustrating a proper way to arrive at a "reasonable" attorney's fee. It involves White's former counsel, Skalet, who was described, at 789, as being relatively inexperienced at the outset of that case, which period of time coincides with the period in which Skalet (Cont.)

The Court of Appeals' statement, at 3a, that "the provision for attorney fees was intended to create an incentive for attorneys to accept and handle Truth-in-Lending cases" is not supported by any authority and is not accurate. The usual statement is that the private attorney general provision (which includes the provision for attorney's fees) is intended to encourage enforcement of the Truth in Lending Act through private litigation. See Postow v. Oriental Building Association, supra, 455 F.Supp., at 784-786, wherein that Court applied the Supreme Court's justification of the private attorney general provision of Title VII of the Civil Rights Act of 1964 (Christiansburg Garment Co. v. Equal Employ-

3/ (Continued) represented White before the Court of Appeals. The District Court's statement, at 21a, that Skalet "obviously possessed in-court experience" and "was of considerable assistance to . . . the Court of Appeals, to support Skalet's higher award, could not have been based on the District Court's observations of Skalet's representation of White in the Court of Appeals.

ment Opportunity Commission, supra) to the Truth in Lending Act: "(1) 'the plaintiff is the chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority' and (2) an award to a successful plaintiff is an award against 'a violator of federal law.'"

The Court of Appeals said, in this connection, at 4a, that White

> was and is entitled to assert his rights as a consumer under the Act; however, we do not think defendant creditors were intended to subsidize the personal crusades of consumers who are attorneys.

That statement singularly treats the petitioner as an attorney who is incidentally a litigant, rather than a litigant who is incidentally an attorney. It discriminates against all attorneys by reason of their status as attorneys because it says, in substance, that if attorneys want to avail themselves of their civil rights under 28 U.S.C. § 1654 to conduct their own litigation as consumers, they must forego the compensation

provided to others by 15 U.S.C. § 1640(a)(3). Conversely, they must forego their civil rights under 28 U.S.C. § 1654 if they want compensation under 15 U.S.C. § 1640(a)(3).

Furthermore, the Court of Appeals' statements, at 4a, that self-representation does not serve the goals of the Truth in Lending Act, totally ignores the prior history of this case. Because White is trained in the law and is an attorney, he saw violations of the Truth in Lending Act that laymen did not see. And he took the initiative as a private attorney general and sued the respondent. White designed the Complaint, fashioned the discovery and pursued the matter at his own expense running into four figures. The vigor of his pursuit resulted in his making enemies along the way. On December 11, 1975, the Court of Appeals said, in substance, at 540 F.2d 645, "White, you were right all along; we are in 100% agreement with you that Arlen violated the Truth in Lending Act." But four years later the

Court of Appeals gave Skalet credit for having "mustered effective arguments" by repeating those provided him by White, and inferred that the goals of the Act were not served by White's alertness, initiative and self-representation. The Court of Appeals would thus destroy the potentially best source of private enforcement of the Truth in Lending Act, namely, consumers who are incidentally attorneys and should therefore know, better than consumers who are laymen in the law, when their rights as consumers are being violated.

The petitioner respectfully submits that the interpretation of the Court of Appeals carves an exception in the plain language of 15 U.S.C. § 1640(a)(3) that is clearly contrary to the intent of Congress to encourage private enforcement of the Truth in Lending Act, and poses a threat to the many other private attorney general provisions that were enacted into law in recent years. And the petitioner respectfully suggests that

the Court of Appeals' exception should not be permitted to stand.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit. The petitioner respectfully suggests that the Court summarily reverse that judgment and remand the case to the Court of Appeals with instructions to promptly decide the issues that are properly before the Court of Appeals respecting the reasonableness of the sum of money in question.

Respectfully submitted,

ALAN J. WHITE
8201 Snug Hill Lane
Potomac, MD 20854

Petitioner, in propria persona

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 77-1784

Alan J. White,

Appellant,

v.

Arlen Realty & Development Corp.,

Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore
Alexander Harvey, District Judge

Submitted: January 10, 1979
Decided: January 29, 1980

Before HAYNSWORTH, Chief Judge, HALL and PHILLIPS, Circuit Judges.

(Alan J. White, Appellant Pro Se, on brief; Joel M. Wolosky, Martin G. Bunin, Parker Chapin Flattau & Klimpl, Franklin Goldstein, Melnicove, Greenberg, Kaufman & Weiner, P.A., counsel on brief for Appellee.)

PER CURIAM:

In White v. Arlen Realty and Development Corp., 540 F.2d 645 (4th Cir. 1975), we instructed the district court to enter judgment for appellant on twelve counts of his complaint under the Truth in Lending Act, 15 U.S.C. § 1601 et seq /the "Act"7. We also directed the award of costs to White and a reasonable fee for appellate counsel, but left the specific amounts for the district court to determine. 540 F.2d at 651. Because the parties did not raise the issue, we also left open the question, whether appellant, an attorney, was

entitled to a fee for his self-representation at trial. We noted only that a ruling on this issue depended upon an analysis of Congressional purpose. 540 F.2d at 651 n.20.

On remand, appellate counsel stipulated a fee of $4,000 for his services. White himself sought a fee of approximately $8,000 in addition to taxable costs and out-of-pocket expenses. After a hearing the district court accepted the stipulation of appellate counsel and awarded White a $750 fee plus costs as taxed by the clerk.

White now appeals this order setting his fee for self-representation and the court's later orders refusing to amend its judgment and denying reconsideration. He claims (1) that the district court's award was arbitrary and unreasonable; (2) that it based its award upon erroneous, off-the-record information; (3) that it should have allowed the recovery of travel and out-of-pocket expenses and (4) that the court denied his motion to alter or amend the judgment without allowing him to supplement his affidavit after receipt of the hearing transcript. Appellant asks us to correct the record and to modify the award. Additionally, he contends that he is entitled to a reasonable fee and his expenses in connection with this appeal.

Appellee contests White's entitlement to a fee under 15 U.S.C. § 1640(a)(3). 1/ Also, it argues that the award was reasonable and that the district court properly disallowed reimbursement for travel and other out-of-pocket expenses. Because we think the district court erred in

1/ Initially appellee moved for summary affirmance of the district court's award, but in supplemental briefing, has requested reversal of the $750 judgment.

awarding any attorney fee to White for his pro se representation, we reverse the judgment of the court below.

Judicial precedent on this issue is sparse and, to a great degree, inapposite. Compare Hannon v. Security National Bank, 537 F.2d 327 (9th Cir. 1976) (law school graduate, who is not licensed to practice law and proceeds as plaintiff pro se, is not entitled to an attorney fee under the Act) with Sellers v. Wollman, 510 F.2d 119 (5th Cir. 1975) (plaintiffs entitled to a reasonable attorney fee notwithstanding fact that no fee was owed to their lawyer, who worked for a legal aid society). Cuneo v. Rumsfield, 553 F.2d 1360, 1367-68 (D.C. Cir. 1977) (attorney who is represented by his law partners in a Freedom of Information Act suit is not automatically barred from attorney fee award under 5 U.S.C. § 552(a)(4)(E) (1974) because he incurred no liability to pay such a fee) and Jones v. United States Secret Service, 81 F.R.D. 700, 701 (D.D.C. 1979) (a federal prisoner acting pro se in a FOIA suit is not barred from attorney fee award under 5 U.S.C. § 552(a)(4)(E)).

Similarly, the legislative history of the Act, and particularly 15 U.S.C. § 1640(a)(3), provides little guidance. It is evident that the provision for attorney fees was intended to create an incentive for attorneys to accept and handle Truth-in-Lending cases--which, even if meritorious, generally result in an award of small statutory penalties. However, we do not think this rationale can be stretched so far as to fund an attorney's desire to be a "private attorney general" on his own behalf. Such a result would raise the specter of fee generation.

It is axiomatic that effective legal representation is dependent not only on legal

expertise, but also on detached and objective perspective. The lawyer who represents himself necessarily falls short of the latter. We do not think self-representation serves the goals of the Truth in Lending Act, and thus we hold that the provisions of § 1640(a)(3) will not be interpreted to allow attorney fees and expenses to plaintiffs who are attorneys and represent themselves. See Hannon v. Security National Bank, 537 F.2d at 328.

The facts in the instant case provide ample support for our view. White, after a protracted legal battle in which his trial inexperience occasioned several admonishments from the district court, lost his case before that court. 2/ When he hired outside counsel to press the issues on appeal, counsel mustered effective arguments and won a reversal of the judgment. This court is not attempting to second-guess what might have happened had White retained counsel at the outset. We do note, however, that the record indicates inexperience, personal embroilment and lack of objectivity on his part throughout the course of the litigation. He was and is entitled to assert his rights as a consumer under the Act; however, we do not think defendant creditors were intended to subsidize the personal crusades of consumers who are attorneys.

The goals of the Act are not fostered by self-representation or fee generation, but rather by independent professional advocacy. Therefore, we adopt a simple rule for Truth-in-Lending actions: plaintiffs who are not represented by attorneys

2/ White filed four different Truth-in-Lending actions in May, 1972, and admits that ". . . I had over-extended myself with respect to my capacity to manage them simultaneously." (Affidavit of Alan White at 2)

may not be awarded attorney fees. 3/

Finding no merit in plaintiff's other assignments of error, the judgment of the district court awarding White an attorney fee for his self-representation at trial is reversed 4/, and his request for fees and costs on appeal is denied.

REVERSED

3/ Although our holding reaches Truth-in-Lending Act cases generally, we do not decide the issue of whether attorneys who represent a class of aggrieved consumers under the Act should be barred from fee awards merely because they are themselves members of the class represented.

4/ The award to White of trial costs taxed by the district court clerk is allowed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALAN J. WHITE)
)
vs.) No. 72-789H,
) CIVIL
ARLEN REALTY & DEVELOPMENT CORP.)

Baltimore, Maryland
February 25, 1977

Before the HONORABLE ALEXANDER HARVEY, II, U.S. District Judge, at 10:00 a.m.

APPEARANCES:

STEVEN A. SKALET, ESQ.
Attorney for Plaintiff

JOEL M. WOLOSKY, ESQ.
FRANKLIN GOLDSTEIN, ESQ.
Attorneys for Defendant

ORAL OPINION

THE COURT: Plaintiff, Alan J. White, an attorney with the Federal Power Commission, brought this suit pro se in this court under the Truth in Lending Act, 15 U.S.C. Sec. 1601 et seq. against Arlen Realty & Development Corp., the owner and operator of Korvettes Department Stores. Plaintiff alleged that Korvettes failed to provide "a brief identification . . . of the goods or services purchased" as required by 15 U.S.C. Sec. 1637 on a series of twelve purchases made by him and his wife. Plaintiff sought the statutory minimum penalty for each violation, plus costs and attorney's fees as provided in 15 U.S.C. Sec. 1640(a)(2).

This Court denied relief in White v. Arlen Realty & Development Corp., 374 F.Supp. 151 (D.Md. 1974). The Fourth Circuit reversed, White v. Arlen Realty & Development Corp., 540 F.2d 645 (4th Cir. 1976), and remanded the case with instructions that judgment of $100.00 be entered for plaintiff on all counts and that costs and attorney's fees be awarded.

Now, following remand, this case is presently before this Court on plaintiff's petition for the allowance of attorney's fees and costs. Although plaintiff appeared pro se in district court, he did retain counsel for his appeal.

There is no question now before the Court that appellate counsel is entitled to attorney's fees. Indeed, the parties have stated their agreement, namely $4000.00. The question presently before the Court is whether a pro se plaintiff, who is himself an attorney, is entitled to attorney's fees and costs under 15 U.S.C. Sec. 1640(a)(3) and if so, what would be reasonable under all the circumstances of this case.

The starting point for this Court's analysis is the language of the Fourth Circuit in footnote 20 of its opinion, 540 F.2d at 651 and 652, where the 4th Circuit said this:

> "We note that White appeared pro se in the district court. Since the question was not presented below, and has not been briefed on appeal, we intimate no opinion whatsoever as to whether or not one who appears pro se is entitled to counsel fees.
>
> In Bone v. Hibernia Bank, 354 F.Supp. 310 (N.D. Cal. 1973), rev'd on other grounds, 493 F.2d 135 (9th Cir. 1974), the district judge simply asserted, without analysis, that "it is well

settled" that one who appears pro se is not entitled to counsel fees. We believe the authorities cited are insufficient to establish such an absolute rule. One of the two cases employed by the district judge directly supports his statement. The other does so by analogy in that it denies attorney's fees to a party represented by the Legal Aid Society. We believe that second case is wrongly decided. Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 517 F.2d 1141, 1147-48 (4th Cir. 1975). See also Sellers v. Wollman, supra, at 123. There are many cases, e.g., Miller v. Amusement Enterprises, Inc., 426 F.2d 534 (5th Cir. 1970) that award counsel fees in fact situations falling outside the traditional attorney-client relationship.

We believe the question of attorney's fees in this case is an open one--ultimately dependent upon analysis of congressional purpose."

15 U.S.C. Sec. 1640(a)(3) provides that the Court shall award "in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the Court." The legislative history is not particularly enlightening as to the congressional purpose insofar as it is related to the circumstances of this case. It is significant, however, that the House Report (House Report No. 1040, 90th Congress, 2d Session, 1968 U.S.C. Cong. and Admin. News at p. 1976) stated, "While primary enforcement of the (Truth-In-Lending) bill would be accomplished under the administrative enforcement section discussed above, further provision is made for the institution of civil action by an aggrieved debtor." Therefore, this is not a situation where Congress intended to encourage "private attorneys-general" as the primary means for enforcement of the

statute. Cf. Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974).

This Court would note, however, that the Truth In Lending Act "is to be construed liberally in favor of the consumer." Thomas v. Myers-Dickson Furniture Co., 479 F.2d 740, 748 (5th Cir. 1973).

Under the common law and also under federal law, see Hannon v. Security National Bank, 537 F.2d 327, 329 (9th Cir. 1976), a person who is not an attorney cannot recover an attorney's fee when he personally conducts his own suit. See 20 C.J.S. Costs Sec. 218(b).

The question in the instant case, whether a pro se plaintiff, who is an attorney, can recover an attorney's fee, is a closer question both at common law and under the Truth In Lending Act.

After a review of the authorities that have been cited and after hearing argument here this morning, I am satisfied that a successful plaintiff should not be denied attorney's fees under Sec. 1640(a)(3) merely because he acts as his own attorney. I think the principle is similar to the situation where a plaintiff is represented by a legal aid society. See Sellers v. Wollman, 510 F.2d 119 (5th Cir. 1975) and cases cited therein; also, Campbell v. Liberty Financial Planning, 422 F.Supp. 1386 (D.Neb. 1976); Gillard v. Aetna Finance Co., Inc., 414 F.Supp. 737 (E.D.La. 1976). The Fifth Circuit in Sellers reasoned as follows:

> "Sec. 1640(a)(2) directs their award and such an award is not contingent upon an obligation to pay an attorney, or the fact that no fee was charged."

See 520 F.2d at 123. Incidentally, as previously

noted, Sec. 1640(a)(2) is now Sec. 1640(a)(3). I would apply that same reasoning here, as the purpose of Sec. 1640(a)(3) is to facilitate private enforcement of the Truth in Lending Act. I think this Congressional purpose would be enhanced if a pro se plaintiff attorney were to be awarded attorney's fees. I am not persuaded by the reasoning of the federal cases cited by the defendant which have held to the contrary. I would also note that at common law, there is a split of authority on the question whether a pro se plaintiff attorney can recover attorney's fees. However, I think the better rule was stated in Kopper v. Willis, 9 Daly 460, 468-69 (New York Court of Common Pleas, 1881). In accord with this is the more recent case of Wells v. Whinert, 34 Mich. App. (Mich. Court of Appeals), 192 N.W. 2d 81 (1971).

Perhaps even more difficult in this case is the determination of the amount of the attorney's fee to be awarded to White. In the opinion of this Court, a pro se plaintiff-attorney could probably never perform as adequately in a case as outside counsel because of his personal and very emotional involvement in the issues. This plaintiff-attorney, Mr. White, is entitled to "a reasonable attorney's fee" and the decision must be made on the basis of Mr. White's performance in this particular case. The plaintiff seeks $7,800 as a fee for his services performed at and prior to trial. With the $4,000 for the appeal, this would come to a total fee in this case of $11,800. In assessing the value of an attorney's services, the Court is itself an expert on the question, and may make its judgment as to the amount to be awarded from its own knowledge and experience of reasonable fees and from the facts before it without the aid of the testimony of witnesses as to value. See Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary

Corp., 341 F.Supp. 1077, 1083 (E.D.Pa. 1972); Wright & Miller, Fed. Practice and Procedure, Sec. 2675, p. 196.

In the opinion of this Court, Mr. White, who had little trial experience, did not perform in a very competent and helpful manner. Indeed, he was well advised to engage counsel with practical courtroom experience to handle the appeal, and probably learned during the pre-trial and trial stages of this case that he would fare better if outside counsel took the case on. What this Court has to decide is how much, if anything, should be awarded to an inexperienced pro se attorney-plaintiff whose performance is well below the average of the attorneys who practice regularly before this Court.

The first inquiry of a Court in deciding upon the amount to be awarded as attorney's fees should be into the hours spent by an attorney, including how many hours were spent in what manner. Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3rd Cir. 1973). While the amount thus found to constitute reasonable compensation should be the "lodestar" of the Court's fee determination, two other factors should be taken into account in computing the value of an attorney's services, namely, the contingent nature of success and the extent, if any, to which the quality of an attorney's work mandates either increasing or decreasing the amount to which the Court has found the attorney reasonably entitled. 487 F.2d at 168.

Mr. White did not maintain any time records up until the end of 1973. His estimate of 62 hours will be accorded little weight as it is considered no more than a guess arrived at many months after much of the time was spent. After

that date, he claims he spent some 128 hours. However, his time records after January 1, 1974, are not broken down and would appear to overstate at least some of the time spent on this case. For example, Mr. White shows 4½ hours for a conference with the Court on February 1, 1974, a conference which lasted no more than an hour, and he shows 3 hours on February 28, 1974, for a hearing which lasted no more than three-quarters of an hour. He shows 10 hours on March 21 for the trial, while the record shows that the time spent in court was no more than 4½ hours. If Mr. White has included travel time in these calculations, he should have broken down these figures so that the Court would be better able to assess the actual time spent in performing legal services and the actual time spent traveling to and from court.

Some of the time spent is clearly non-compensable. The complaint includes a Count XIII, in which the plaintiff sought a type of injunctive relief. The defendant moved to dismiss this count; the matter was briefed by the parties and the Court granted the motion to dismiss. See 374 F.Supp. 151 at 161. No appeal was taken from the Court's action in this regard. Plaintiff would not be entitled to be awarded an attorney's fee for time spent on that portion of the litigation which proved to be unsuccessful.

With reference to the contingent nature of this case, it should be noted that plaintiff was successful in collecting $100 plus costs and a reasonable attorney's fee. His risk of receiving nothing for his services was minimized by the fact that he performed these services during his spare time and for the entire period he was being paid a salary by the federal government. As previously found by the Court, plaintiff's motive in proceeding in this case as a private attorney

general is suspect in view of the fact that he took no action until a dispute arose with the defendant concerning the quality of merchandise purchased on January 29 and February 1, 1972. See 374 F.Supp. at 157, n.5. This finding was not disturbed by the Fourth Circuit on appeal.

With reference to the quality of the services performed, the following findings are pertinent: (1) For the eleven years before these actions were filed, from 1961 to 1972, Mr. White was not engaged in trial practice. During that period of time, he worked for the SEC, the Federal Home Loan Bank, the Federal Power Commission and for a law firm which did corporate and SEC work. While with this law firm in Baltimore, in the years 1969 and 1970, he did not do litigation work. His lack of familiarity with this Court's rules and with trial procedures generally was apparent throughout. (2) Much wasted effort was involved. Mr. White filed two cases when one was certainly sufficient. He did not file suit in Maryland at all, although the Korvette's store where he dealt was located in Rockville, Maryland. Much of the early time in this case was spent in proceedings relating to the transfer of these two cases to the District of Maryland. Plaintiff engaged in unnecessary discovery, and when his deposition was taken, he refused to answer many relevant questions. The facts here were not complicated and did not require extensive discovery procedures on plaintiff's part. (3) On several occasions, Mr. White was not properly prepared for court appearances. Indeed, in his letter to the Court of September 7, 1973, he admitted he was unprepared because of certain personal matters and the pretrial conference, which had been scheduled for September 13, 1973, had to be postponed. It was necessary for the Court to remind Mr. White on several occasions that court appearances and preparations for such

appearances took precedence over his personal commitments. (4) Much of Mr. White's time was wasted by personal attacks on defendant and its attorneys. He repeatedly charged the defendant with bad faith. Following a hearing on February 1, 1974, the Court rejected plaintiff's motion seeking, inter alia, counsel fees and expenses because defendant had allegedly been neglectful. The delay had for the most part been caused by Mr. White himself. Mr. White's motion for a new trial was an intemperate attack upon this Court and its ruling. Accusing the Court of "machinations," the plaintiff suggested that he had not prevailed because he did not possess the "economic clout of a New York Stock Exchange company such as the defendant." A brief containing language of this sort is hardly of much assistance to the Court. Factors such as these raise a question as to Mr. White's entitlement to any attorney's fees at all on the record here, even though the Court has concluded that a pro se plaintiff attorney may recover reasonable attorney's fees under the Truth In Lending Act. Nevertheless, the plaintiff did prevail in this case and did establish that the Act requires proper identification of goods or services purchased by a credit card holder. Thus, in spite of Mr. White's shortcomings as a trial attorney, he will be awarded a modest fee in this case.

Applying all the factors discussed herein, I have decided to award the plaintiff as a reasonable attorney's fee the sum of $750 for legal services at and prior to trial.

As agreed, the judgment will also include no more than $4000 for legal services on appeal, and the order will also include an allowance of costs. These will be costs as taxed by the Clerk and not disbursements as claimed by the plaintiff. I see

no difference in a case under the Truth In Lending Act from one under the Clayton Act and other cases which also provide for the award of costs; and I am satisfied that these are taxed costs and not disbursements.

So, gentlemen, I will prepare an order to that effect and see that each of you receives a copy of the order. And there is a form for applying for costs. Mr. Skalet, if you would get that from the Clerk, you can tax your costs and that then goes to the --

MR. SKALET: Your Honor, the judgment will include the $100.00 --

THE COURT: Yes, it will be the $100, the attorney's fees and costs as taxed by the Clerk, and I will prepare that when I send it to you, which would then be the final judgment.

Alright, thank you very much.

(Thereupon, at 11:40 a.m., the aforecaptioned proceedings were concluded.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALAN J. WHITE :
Plaintiff
v. : Civil No. 72-789-H

ARLEN REALTY & :
DEVELOPMENT CORP.
Defendant :

- - - - - - - - - - - - -

ALAN J. WHITE :
Plaintiff
v. : Civil No. 72-998-H

ARLEN REALTY & :
DEVELOPMENT CORP.
Defendant :

O R D E R

This consolidated case having been remanded by the United States Court of Appeals for the Fourth Circuit for the entry of judgment (see 540 F.2d 645); and a hearing having been held this day in open court for a determination of the costs and attorneys' fees to be awarded, it is this 25th day of February, 1977, by the United States District Court for the District of Maryland, for the reasons stated in the Court's oral Opinion,

ORDERED:

1. That judgment be and the same is hereby entered in favor of the plaintiff against the defendant in the amount of $100.00;

2. That, in addition, plaintiff shall recover from the defendant as reasonable attorneys' fees the amount of $750.00 for legal services

rendered before and at the trial of this action, and the further amount of $4,000.00 for legal services rendered in connection with the appeal; and

3. That plaintiff shall recover from the defendant his costs as taxed by the Clerk.

/s/ Alexander Harvey II
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALAN J. WHITE :
Plaintiff
v. : Civil No. 72-789-H

ARLEN REALTY & :
DEVELOPMENT CORP.
Defendant :

- - - - - - - - - - - - -

ALAN J. WHITE :
Plaintiff
v. : Civil No. 72-998-H

ARLEN REALTY & :
DEVELOPMENT CORP.
Defendant :

MEMORANDUM AND ORDER

Following remand of this case pursuant to White v. Arlen Realty & Development Corp., 540 F.2d 645 (4th Cir. 1976), the plaintiff filed a petition for the allowance of attorney's fees and costs. The questions presented by plaintiff's petition were fully briefed by the parties, and a hearing was held in open court on February 25, 1977. In a lengthy oral Opinion, this Court ruled that a pro se plaintiff who is an attorney can recover an attorney's fee under the Truth in Lending Act, and the Court discussed in some detail considerations relating to the award of an appropriate fee to the plaintiff, Alan J. White. An Order was thereupon entered, granting judgment in favor of the plaintiff in the amount of $100.00 (as directed by the Fourth Circuit), awarding Mr. White a fee of $750.00 and his appellate counsel a fee of $4,000.00, and directing that the plaintiff should recover his costs as taxed by the Clerk.

The plaintiff has now filed a motion to amend or alter this judgment, pursuant to Rules 52 and 59 of the Federal Rules of Civil Procedure. Attached to such motion is a memorandum of law and an 11-page affidavit of the plaintiff, Alan J. White. The defendant has filed a memorandum in opposition to this motion. After a review of the motion, memoranda and affidavit and after a further review of the previous pleadings pertaining to these issues, this Court has concluded that, pursuant to Local Rule 6, no hearing is necessary for a decision on the pending motion and that it should be denied.

Questions pertaining to Mr. White's entitlement to a reasonable attorney's fee were fully and carefully briefed and argued by counsel. Most of the contentions made by the plaintiff in his post-hearing motion were previously considered and rejected by the Court. The new arguments are no more than afterthoughts, and plaintiff's affidavit in fact supports some of the findings previously made by this Court. This Court's 13-page oral Opinion has now been transcribed, and the Court is satisfied that the findings and conclusions set forth in such oral Opinion are correct, are complete and are supported by the record in this case and by the applicable law.

In his motion, plaintiff seeks a rehearing and an opportunity to file an additional affidavit, an increase in the award of attorney's fees made to him and an allowance of his expenses and disbursements in addition to the costs taxed by the Clerk. The matters set forth in the plaintiff's affidavit were known to him at the time of the previous hearing and cannot be considered to be after-discovered evidence. There is no need for a rehearing, as the issues were fully argued by counsel in open court. Moreover, this

Court is satisfied that Congress intended "the costs of the action" in 15 U.S.C. § 1640(a)(3) to mean taxable costs and not a party's expenses and disbursements. See Harrisburg Coalition Against Ruining the Environment v. Volpe, 65 F.R.D. 608, 612 (M.D.Pa. 1974).

In the pending motion, the plaintiff objects most strenuously to this Court's award of an attorney's fee of $750.00 to him for legal services rendered before and at the trial of this action. In awarding plaintiff a minimal fee, this Court found and concluded (1) that plaintiff's time estimates were not reliable and that some of his time was non-compensable; (2) that plaintiff had incurred little risk in bringing this action, since he was being paid a salary by the federal government during the entire period of the litigation; (3) that the plaintiff had little trial experience and had wasted the time of the Court; and (4) that in general the plaintiff had not performed in a very competent and helpful manner. Many of the statements contained in the plaintiff's affidavit support these findings. Plaintiff brought four lawsuits at or about the same time in May of 1972 and attempted to prosecute all of them without the assistance of counsel. He admits that he did not keep time records because he was not focusing on supplying a justification for legal fees (p. 2), that he overextended himself with respect to his capacity to manage these suits simultaneously (p. 2), that he became infuriated when this Court ruled against him and "lost my objectivity" (p. 3), that he failed to follow through as required by the Court because he had overextended himself (p. 6, 7), that he was not prepared for the pretrial conference on September 12, 1973 (p. 7), and that he was inattentive to this litigation from early to late 1973 (p. 3). It further appears that plaintiff typed all of his own

papers and that the time claimed by him includes the time it took him to type drafts and redrafts of all the pleadings and memoranda filed. This fact was not known by the Court at the time that the plaintiff's fee was originally fixed and would quite clearly lessen the number of hours for which the plaintiff could properly claim an award for services performed as an attorney.

With an unbecoming display of ingratitude, Mr. White attempts to take full credit for the successful appeal which was not handled by him but by other counsel, and he apparently does not approve of the $4,000 fee awarded to such counsel. Following the completion of proceedings in this Court, Mr. White engaged Steven A. Skalet, of Washington, D.C., to prosecute the appeal. Although disclaiming any intention to "degrade the value of my counsel's services on appeal" (p. 3), Mr. White in his affidavit does just that. At page 10 of his affidavit, Mr. White states that he did not approve of the stipulation between the parties whereby $4,000.00 was awarded to Mr. Skalet for his services, and Mr. White criticizes Mr. Skalet for not informing him in advance of the stipulation. Mr. White claims that Mr. Skalet would not have prevailed if he (Mr. White) had not provided a proper foundation (p. 3). He further states that "the case before the Fourth Circuit was the case which I, and not my counsel, developed" (p. 3, emphasis in original), and claims that if Mr. Skalet's services are worth $4,000.00, then his (Mr. White's) are worth more than $8,000.00.

The reason for the substantial difference in the awards to Mr. White and to Mr. Skalet is well substantiated by the record here. Mr. Skalet, who obviously possessed in-court experience and who was complimented by this Court during the hearing in February, performed competently and

was of considerable assistance to this Court and to the Court of Appeals. Mr. White, who was inexperienced and obviously not familiar with this Court's rules and with trial procedures generally, wasted the time of this Court and performed in a manner described by this Court in its oral Opinion as "well below the average of the attorneys who practice regularly before this Court." (Tr. 8).

In the Truth in Lending suit which Mr. White brought in the United States District Court for the District of Columbia, White v. Lynn Jewelers, Civil No. 995-72 (Judgment entered April 22, 1975), Mr. White was awarded an attorney's fee of $100.00. For his services acting pro se in this Court, he was awarded a fee of $750.00. On the record here, this Court is satisfied that the award was a reasonable one.

For the reasons stated, it is this 6th day of April, 1977, by the United States District Court for the District of Maryland,

ORDERED that plaintiff's motion to amend or alter judgment be and the same is hereby denied.

/s/ Alexander Harvey II
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALAN J. WHITE Plaintiff	:	
v.	:	Civil No. 72-789-H
ARLEN REALTY & DEVELOPMENT CORP. Defendant	:	
- - - - - - - - - - - - - - -		
ALAN J. WHITE Plaintiff	:	
v.	:	Civil No. 72-998-H
ARLEN REALTY & DEVELOPMENT CORP. Defendant	:	

MEMORANDUM AND ORDER

On April 6, 1977, this Court filed a Memorandum and Order, denying plaintiff's motion to amend or alter the judgment entered herein on February 25, 1977. Such motion had been filed by plaintiff's counsel of record, Mr. Steven A. Skalet.

Plaintiff has now filed, pro se, a motion for rehearing and/or reconsideration of this Court's denial of his previous motion for a rehearing or reconsideration. Plaintiff has also filed, pro se, a motion for an extension of time within which to file further papers in support of his motion for rehearing and/or reconsideration.

Some question exists whether this Court should accept these pro se pleadings now that plaintiff has counsel of record in this case. In any event, there is no merit to the pending motions. These matters have been sufficiently considered and

reconsidered. This Court will not reconsider its previous denial of plaintiff's motion for reconsideration.

For the reasons stated in this Court's Memorandum and Order of April 6, 1977, it is this 15th day of April, 1977, by the United States District Court for the District of Maryland,

ORDERED:

1. That plaintiff's motion for an extension of time be and the same is hereby denied; and

2. That plaintiff's motion for rehearing and/or reconsideration of this Court's Memorandum and Order dated April 6, 1977, be and the same is hereby denied.

/s/ Alexander Harvey II
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALAN J. WHITE :
:
Plaintiff, :
:
v. : CA Nos 72-789H
: 72-998H
ARLEN REALTY & :
DEVELOPMENT CORP. :
:
Defendant. :

STIPULATION:

It is hereby stipulated by the parties, through counsel, that the amount of attorneys fees to be awarded to Steven A. Skalet for his representations of plaintiff Alan White subsequent to the trial in the United States District Court for the District of Maryland shall be $4,000.00, and that this sum is fair and reasonable compensation for counsel's efforts. This stipulation is not to be construed to release or waive plaintiff's application for costs, including the costs for appeal and for attorneys fees for plaintiff's representation pro se in the District Court.

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Supreme Court, U. S.
FILED
MAY 27 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1676

ALAN J. WHITE,

Petitioner,

v.

ARLEN REALTY & DEVELOPMENT CORP.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

ARLEN REALTY & DEVELOPMENT CORP.'S BRIEF IN OPPOSITION

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May 27, 1980

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1676

ALAN J. WHITE,

Petitioner,

v.

ARLEN REALTY & DEVELOPMENT CORP.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

ARLEN REALTY & DEVELOPMENT CORP.'S BRIEF IN OPPOSITION

Petitioner Alan J. White ("White"), a practicing attorney, seeks review of a decision by the court of appeals which denied him an attorney's fee for his *pro se* activities at and prior to the trial of this action brought under the Truth in Lending Act, 15 U.S.C. section 1601 *et seq.* ("TILA"), in which White recovered a $100 statutory penalty and an attorney's fee of $4,000 for counsel retained by White to represent him in post-trial proceedings.

Opinion Below

The opinion of the court of appeals is officially reported at 614 F.2d 387.

Statutes Involved

The Truth in Lending Act, 15 U.S.C. section 1640(a) (1976), and 28 U.S.C. section 2106 (1976) are set forth as an addendum hereto.

Questions Presented

1. Should this Court reverse the explicit statement by the court of appeals (2a) that appellee Arlen Realty & Development Corp. contests White's entitlement to an award of an attorney's fee because White, who expressly asked the court of appeals to examine the propriety of the district court's award of an attorney's fee for his *pro se* representation in this action, would limit the court of appeals' jurisdiction to an upward modification of the award?

2. Is White, himself an attorney, entitled to an attorney's fee under 15 U.S.C. section 1640(a)(3) for his *pro se* efforts in this TILA action when an attorney's fee has already been awarded to White's retained counsel herein?

Statement of the Case

A statement of the case is included in this brief to clarify the statement contained in White's petition.

White brought this action to recover statutory penalties under the TILA. He claimed that defendant-respondent

Arlen Realty & Development Corp. ("Arlen"), then the owner and operator of Korvettes Department Stores ("Korvettes"), violated section 127(b)(2) of TILA, ch. 41, sec. 127, 82 Stat. 153 (1968) (current version at 15 U.S.C. sec. 1637 (1976)) by failing to provide White, a Korvettes charge account customer and holder of a Korvettes credit card, with a "brief identification . . . of the goods and services" he purchased in 1971 and 1972 (Appendix to the briefs filed in the court of appeals [hereinafter referred to as "A"], at 2-9). White did not claim or prove that he sustained any actual damage as a result of the wrongs alleged.

The district court, after trial, denied relief, holding that White lacked standing to sue and that the identification provided by Korvettes was sufficient to satisfy the requirements of the TILA. 374 F.Supp. 151 (D. Md. 1974). The court of appeals, however, reversed, ruling that (i) neither the failure of Korvettes' purchase and billing procedure to deceive White nor the absence of any service charges denied White standing to sue, 540 F.2d 645, 650 (1976), and (ii) the designations describing the goods purchased by White and contained on the charge slip and cash register tape associated with each sale did not constitute the "brief identification . . . of the goods and services purchased" required by section 127(b)(2), 540 F.2d at 650-51. The case was remanded with instructions that judgment be entered for White in the sum of $100, the minimum statutory recovery, and costs and reasonable attorney's fees as determined by the district court. 540 F.2d at 651, 652.

The role of White *pro se*.

White represented himself in pre-trial proceedings and at the trial of this action. Although he is a full-time attorney employed by the Office of Special Assistants to

the Federal Power Commission, White has represented himself in at least four other TILA actions, both prior and subsequent to the filing of this action (12a, 20a). See, *e.g., White* v. *Central Charge Service, Inc.,* [1969-1973 Transfer Binder] Cons. Cred. Guide (CCH) ¶99,170 (D.C. Sup. Ct. 1972); *White* v. *Lynn Jewelers, Ltd.,* Cons. Cred. Guide (CCH) ¶98,601 (D.D.C. 1975). Four of White's TILA actions, including this one, were commenced in May, 1972, and White admits that "I had overextended myself with respect to my capacity to manage them simultaneously" (4a, fn. 2).

Rather than furthering the intent and purpose of the TILA by participating in its enforcement as a *bona fide* "private attorney general," White has been in the business of prosecuting, *pro se,* actions under the TILA for the sole apparent purpose of generating attorney's fees. This purpose is manifest from White's conduct in *White* v. *Lynn Jewelers, Ltd., supra,* which White prosecuted on his own behalf. Thus, White admits that he settled the attorney's fee aspect of the *Lynn Jewelers* case for a nominal fee of $100 solely in order to create a precedent for a much higher award in this action.* As stated by White:

> "Furthermore, the amount of the attorney's fee [in *Lynn Jewelers*] was fixed therein at $100 pursuant to the Plaintiff's own suggestion. Lynn Jewelers contended therein, as the Defendant argued herein, that the Plaintiff was not entitled to an attorney's fee because he was his own counsel. *And the Plaintiff suggested the modest amount of $100 so that he might obtain precedent for an award of an attorney's fee in this litigation which was then on appeal to the Court of Appeals. . . .*" (emphasis added) (Brief for Appellant White filed in court of appeals, at 27).

* White's counsel, during oral argument in the district court on the question of attorney's fees, relied on the *Lynn Jewelers* case in support of his argument that White was entitled to an attorney's fee since he could find no other Truth-in-Lending cases in which an attorney sued *pro se* and the issue of attorney's fees was raised (A 50; see 22a).

The district court's determination of attorney's fees.

Following the 1975 decision of the court of appeals reversing and remanding this case to the district court, White, at a hearing held on February 15, 1977, was awarded (i) a $4,000 attorney's fee for Steven A. Skalet, Esq. ("Skalet"), White's retained counsel on his successful appeal and remand, (ii) a $750 attorney's fee for his *pro se* representation at trial and (iii) taxable costs (14a-15a).

Prior to the hearing, counsel for Arlen had indicated that Arlen would not oppose a fee in the amount of $4,000 for White's retained counsel, but that it would, as a matter of law, oppose any fee for White's *pro se* representation (Brief for Appellee Arlen filed in the court of appeals, at 9). At the hearing, counsel for both Arlen and White stipulated that $4,000 would be fair and reasonable compensation for Skalet's efforts on his successful appeal to the court of appeals and on the district court's subsequent determination of attorneys' fees (A 51; see 21a-22a). This Court then proceeded to determine that, based upon the evidence presented, this fee was, in fact, fair and reasonable (A 51-52; see 21a-22a).

The balance of the hearing was devoted to the argument of the legal question as to whether White was entitled, as a matter of law, to any fee whatsoever and the

consideration of White's proofs submitted in support of his fee application (A 52-73).

The court determined that White should be awarded an attorney's fee and, after due consideration of the evidence presented, set the amount of the fee at $750 (14a). In examining the evidence, the district court observed that White's performance was "well below the average of the attorneys who practice before this Court" (11a); that "[h]is lack of familiarity with this Court's rules and trial procedures generally was apparent throughout" (13a); that "[m]uch of Mr. White's time was wasted by personal attacks on defendant and its attorneys" (14a); and that White "had wasted the time of the Court" (20a).

White's appeal to "correct the record and modify the award" of attorney's fees for his representation *pro se*.

On his appeal from the district court's determination of fees and costs, White requested the court of appeals:

> "*to correct the record and to (1) modify the award to allow him a 'reasonable' attorney's fee* as required by 15 U.S.C. §1640 (a)(3); (2) permit him to recover the non-taxable costs of this litigation *. . . and (3) permit him to recover the taxable and non-taxable costs of this appeal together with a 'reasonable' attorney's fee for his services preliminary to and in connection with this appeal. . . .*" (emphasis added) Brief for Appellant White filed in court of appeals, at 33.

In order that the court of appeals could re-determine the propriety of the district court's award, White, in his appellate briefs, (i) urged reconsideration and reexamination of alleged facts presented to the district court and

(ii) set forth alleged facts which were not part of the record of the district court.*

Arlen, following the submission of its brief in opposition to White, moved, on February 2, 1978, for summary affirmance of the district court's award pursuant to Rule 7 of the Rules of the United States Court of Appeals for the Fourth Circuit (2a, fn. 1). However, as a result of its perusal of the record, the court of appeals subsequently requested supplemental briefing from both White and Arlen on the question of whether a lawyer proceeding *pro se* is entitled to an award of attorney's fees under the TILA, 15 U.S.C. section 1640(a)(3).

The court of appeals held that a lawyer proceeding *pro se* is not entitled to attorney's fees in a TILA action, thereby reversing the order of the district court. The court reasoned:

> "It is evident that the provision for attorney fees was intended to create an incentive for attorneys to accept and handle Truth-in-Lending cases. . . . However, we do not think this rationale can be stretched so far as to fund an attorney's desire to be a 'private attorney general' on his own behalf. Such a result would raise the specter of fee generation." (3a)

Additionally, it was held that (i) the district court did not err in refusing to award White his travel and out-of-pocket expenses (5a) and (ii) White could not recover fees or costs on the appeal itself (5a).

---

* The necessity for the court of appeals to reassess, in detail, the evidence submitted at the district court hearing, is clear. Having originally petitioned the district court for $8,000 as an attorney's fee for his representation *pro se* and moved to alter or amend the judgment by increasing the $750 award to $4,000, White stated to the court of appeals that $6,000 would be "tentatively reasonable" (Brief for Appellant White filed in court of appeals, at 26).

White's petition, in essence, merely rehashes the same arguments which he urged to the court of appeals. In large measure, White predicates his petition upon the alleged shortcomings of Skalet, his retained counsel, and has paraded the claimed sordid details of his attorney-client relationship before this Court. They are neither relevant nor appropriately raised here.

Furthermore, the multitude of factual allegations contained in White's petition go far beyond both the record below and the questions presented to this Court. Thus, stripped of its carping, White's lengthy polemic amounts to nothing more than yet another personal plea for an attorney's fee separate and apart from the statutory penalty and fee award for Skalet already granted him.

ARGUMENT

I.

The court of appeals properly addressed the question of White's entitlement to an attorney's fee for his *pro se* efforts in this action.

White has in no way demonstrated that the question of his entitlement of an attorney's fee for his self-representation in this action was erroneously raised in the court of appeals. In this regard, the district court ruled on the question, following consideration of the briefs submitted by the parties and oral argument (7a-10a, 19a). On appeal, moreover, White himself requested that the court of appeals search the record of the district court, and after due reexamination thereof, substitute its judgment for that of the district court on the attorney's fee question (Brief for Appellant White filed in court of appeals, at 33; see pp. 7-8, *supra*).

In any event, White was not prejudiced by the alleged error he now seeks to review, or surprised by it. Indeed, he had a full opportunity to argue the issue to the court of appeals (2a; Pet. 17).

Placed in this posture, the ability of the court of appeals to review the record and reverse the district court's award of an attorney's fee to White is unquestioned. *Tug Raven* v. *Trexler,* 419 F.2d 536 (4th Cir. 1969), *cert. denied sub. nom. Crown Petroleum Corp.* v. *Trexler,* 398 U.S. 938 (1970); *Rhoads* v. *Ford Motor Company,* 514 F.2d 931 (3rd Cir. 1975); *International Business Machines* v. *Levin,* 579 F.2d 271, 278 (3d Cir. 1978). As enunciated by the court in *Rhoads* v. *Ford Motor Company, supra,* 514 F.2d at 934:

> "Once appellate jurisdiction attaches, 'the power of the court of appeals should be plenary to the extent that it chooses to exercise it. A court should not close its eyes to what is plainly there.'"

Under these circumstances, it is established that the court of appeals may modify a judgment in favor of an appellee in the absence of a cross-appeal. *Langnes* v. *Green,* 282 U.S. 531, 535-538 (1931); *Tug Raven* v. *Trexler, supra,* 419 F.2d at 548; 28 U.S.C. section 2106 (1976); 9 Moore's Federal Practice (1980 ed.) ¶110.25[1] at 273; see *Hurwitz* v. *Directors Guild of America, Incorporated,* 364 F.2d 67 (2d Cir.), *cert. denied,* 385 U.S. 971 (1966).

II.

The ruling of the court of appeals on White's entitlement to an attorney's fee for his representation *pro se* conforms with applicable precedent.

The court of appeals' holding that a lawyer proceeding *pro se* under the TILA is not entitled to the recovery of an attorney's fee creates no conflict with any decisions of this Court or other circuits. Indeed, White cites no decisions of this Court that address any aspect of this issue. Moreover, the decisions of other circuit courts cited by White are either supportive of the decision below or inapposite. *Hannon* v. *Security National Bank,* 537 F.2d 327 (9th Cir. 1976) (a law school graduate not licensed to practice law is not entitled to recover an attorney's fee for prosecuting a TILA action *pro se*); *Sellers* v. *Wollman,* 510 F.2d 119 (5th Cir. 1975) (plaintiffs should not be denied attorney's fees under the TILA because the attorney representing them was employed by a legal aid society); *Manning* v. *Princeton Consumer Discount Company, Inc.,* 533 F.2d 102 (3d Cir.) *cert. denied,* 429 U.S. 865, *rehearing denied,* 429 U.S. 933 (1976) (same).

Significantly, the weight of authority, in conformity with the holding of the court of appeals in this case, denies the recovery of attorney's fees to plaintiffs who appear *in propria persona.* See, *e.g., Bone* v. *Hibernia Bank,* 354 F. Supp. 310 (N.D. Cal. 1973) (TILA action); *Picking* v. *Penn. R. Co.,* 11 F.R.D. 71, 72 (N.D. Pa. 1951), *appeal dismissed,* 201 F.2d 672 (3d Cir.), *cert. denied,* 345 U.S. 1000, *rehearing denied,* 346 U.S. 843 (1953) (" 'The general rule is that an attorney who acts for himself is not entitled to a counsel fee against his adversary' "); *Gorse* v. *Parker,* 36 F. 840 (C.C.N.D. Ill. 1888) (a layman representing himself may not recover under a statute providing for the allowance of compensation to "attorneys, solicitors and proctors in the courts of the United States").

Moreover, White, a full-time attorney employed by the federal government, maintained a private practice prosecuting numerous TILA cases on his own behalf. This type of conduct should not be countenanced or rewarded, especially where the sole apparent purpose of the litigation is to advance White's private commercial interest by the generation of attorney's fees.

In this regard, the TILA may not be used as a vehicle for obtaining windfall profits or unjustly enriching plaintiffs or their counsel. As was observed in *Andrucci* v. *Gimbel Brothers,* 365 F.Supp. 1240, 1243 (W.D. Pa. 1973), *aff'd,* 505 F.2d 729 (3d Cir. 1974):

> "The obvious intent of Congress was to set standards by which to achieve meaningful 'truth-in-lending' and not to deviously set traps by which windfalls could be reaped by fanciful lawyers."

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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ADDENDUM

Text of Statutes Involved

The Truth in Lending Act, 15 U.S.C. section 1640(a) (1976), provides:

> "(a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part of part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of
>
> (1) any actual damage sustained by such person as a result of the failure;
>
> (2) (A) (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or
>
> (B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor; and
>
> (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

> In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional."

28 U.S.C. section 2106 (1976) provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances."

Supreme Court, U. S.
FILED
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No. 79-1676

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

ALAN J. WHITE,

Petitioner,

v.

ARLEN REALTY & DEVELOPMENT CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY TO THE RESPONDENT'S BRIEF IN OPPOSITION

ALAN J. WHITE
8201 Snug Hill Lane
Potomac, MD 20854

Petitioner,
in propria persona

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IN THE SUPREME COURT OF THE UNITED STATES

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v.	:	No. 79-1676
ARLEN REALTY & DEVELOPMENT CORP., Respondent.	:	

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PETITIONER'S REPLY TO THE RESPONDENT'S BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

The petitioner, Alan J. White, is submitting this brief pursuant to Rule 24(4) in reply to the arguments first raised in Arlen Realty & Development Corp.'s Brief in Opposition.

Arlen's opposition focuses on the facts rather than the law 1/, and would have this Court believe that White does not deserve an attorney's fee because (1) he did not claim or prove that he sustained any actual damage, (2) he initiated this lawsuit for the sole purpose of generating an attorney's fee and (3) he did a poor job at and before trial. This reply will examine Arlen's claims briefly.

REPLY ARGUMENT

1. White is a Bona Fide "Private Attorney General"

White commenced this lawsuit and three similar ones in May 1972. As stated by Arlen (at 3), White did not claim or prove that he sustained any actual damage as a result of Arlen's violations of the Truth in Lending Act. But, as Arlen failed to state, the Truth in Lending Act in 1972 did not provide for the recovery of actual damage. It was amended in 1974 (after the trial) to so provide, and White subsequently asked for actual damages. 2/

Arlen asserts (at 4 and 11) that White was not serving in this litigation as a "private attorney general", but was prosecuting this suit for the sole purpose of generating an attorney's fee. Arlen's contention is similar to the District Court's accusation mentioned in White's petition at 6:

> Ultimately, the District Court accused White of being motivated by personal considerations, rather than a desire to serve as a private attorney general, and utilized that accusation as a footnote reason for denying White's claim on the merits. 347 F.Supp. at 157, n. 5. White was able to prove that his motive in serving as a private attorney general was pure, and he introduced evidence in the record

1/ White hereby adds the following citation to his argument on the question of subject matter jurisdiction: 9 Moore's Federal Practice 204.11 (Rel. 46 - 3/80 Pub. 410).

2/ Arlen's quotation (at 6) of White's brief to the Court of Appeals omits the following underscored words: "Accordingly, the Plaintiff respectfully requests the Court of Appeals to . . . (2) permit him to recover the non-taxable costs of this litigation either as part of the attorney's fee or as 'actual damage' pursuant to 15 U.S.C. § 1640(a)(1)".

to prove that fact.

The argument that follows is a verbatim repetition of the pertinent part of White's Motion for New Trial and Other Relief in the District Court, that contained such proof and served as the basis for the ultimate reversal of that court's decision on the merits. The only unmarked changes conform references to the appendix pages, and footnotes to the numbering sequence, of this brief:

* * *

Plaintiff's "suspect" motive

It is apparent from the Court's virtual total acceptance of the Defendant's position, and its total failure to acknowledge any of the arguments underlying the Plaintiff's position, that the Court's decision is based in large part on its belief that the Plaintiff is pursuing a personal vendetta and, conversely, is not acting as a private attorney general under the Truth in Lending Act. Nothing could be further from the truth,

and the Plaintiff hereby makes a complete and unqualified denial.

Beginning on page 8 /374 F.Supp., at 1567, the Court publishes in full the Plaintiff's letter to the Defendant dated February 17, 1972, complaining about certain goods and services. In a footnote on page 10 /374 F.Supp., at 1577 the Court states that the "plaintiff's motive in proceeding in this case as a private attorney general is suspect" in view of the fact that he did not commence this litigation until after that complaint arose. And on page 16 /374 F.Supp., at 1607 the Court says,

> "Plaintiff made no complaint to nor claim against defendant concerning the inadequacy of the identifying language in question until after a dispute arose as to the handling of his orders in late January or early February 1972 and the quality of the merchandise then purchased. At the time he or his wife made all the purchases involved in this case, plaintiff was well aware of the provisions of the Truth in Lending Act, as he was then personally involved in litigation in the District of Columbia in which he sought to recover civil penalties for alleged violations under § 1637(b) of the Act. White v. Central Charge Service, Inc., 285 A.2d 305 (D.C.App.

1971). His dissatisfaction with the identifying language used at Korvettes Rockville store apparently had little to do with the filing of these suits."

The Court thus builds up its case against the Plaintiff on the basis of two facts, and two facts alone: (1) The Plaintiff prosecuted a prior lawsuit under the Truth in Lending Act. And (2), the Plaintiff's complaint concerning goods and services arose prior in time to the commencement of this litigation. From these facts the Court infers, among other matters, (page 16) /374 F.Supp., at 1607 that from the time of his prior litigation the Plaintiff was cognizant of all of the ramifications and implications of the Truth in Lending Act including, specifically, his right to sue on the issues which he raises in this litigation, and (page 11) /374 F.Supp., at 1577 this litigation was not commenced earlier because the Plaintiff was satisfied with his course of dealing with the Defendant. Apparently it did not occur to the Court that the Plaintiff would

not have returned his charge cards in February 1972 if he were pursuing a personal vendetta and if he had been fully aware of his rights under the Truth in Lending Act. Instead, the Plaintiff would have increased his charge account activity so that his eventual lawsuit against the Defendant would have embraced many more than twelve transactions -- so many more that he could not conceivably have remembered what he purchased in very many of them.

The point is that the Court erred in its impermissible piling of inferences on inferences. The Plaintiff has steadfastly maintained that the complaint which he asserted in his letter of February 17, 1972, has nothing to do with this litigation, and that the origin of this litigation has nothing to do with the merits. 3/ This is demonstrated as follows:

3/ As discussed infra, the Defendant stopped billing the Plaintiff in March 1972 and was not billing him when the litigation was commenced in May 1972.

The Court correctly found in a footnote on page 15 /374 F.Supp., at 1607 that the Plaintiff's first lawsuit against Central Charge involved "other questions under § 1637(b)." During oral argument on October 29, 1971, a judge of the Court of Appeals caused the Plaintiff to read aloud each of the ten disclosure items of that provision and to state whether he claimed a violation of each particular item. That was both a traumatic experience for the Plaintiff and the first time that he read Subsection (b)(2) with the thought of possible violation, but the thought immediately passed from the forefront of his mind as he and the Court of Appeals turned to Subsection (b)(3).

Late in April 1972, after all the operative facts pertinent to this litigation had occurred, and after the Plaintiff had returned his credit cards to the Defendant, the Plaintiff read a "Letter" under the heading "Undescriptive billing" in the May 1972 issue of Consumer Reports. (See

26a-27a.) The "Letter" caused the Plaintiff's thoughts to flash back to the time of the oral argument; and it also caused the Plaintiff to reread carefully his statutory, regulatory and other materials pertaining to the Truth in Lending Act. The Plaintiff was then generally dissatisfied with the quality of identification provided by various issuers of credit cards, particularly the issuers of so-called "bank" credit cards where merchants (not generally under the control of the issuers) would frequently identify merchandise as "merchandise", or attempt no identification whatsoever. As a result of such dissatisfaction and his further studies initiated by the "Letter", the Plaintiff developed the concept of litigation under § 1640(a) to obtain better identification.

On April 25, 1972, the Plaintiff wrote a letter to Consumer Reports (28a-30a) concluding,

> "You . . . caused me to realize that the sooner consumers cause merchants to respond to such civil liability, and the more widespread, the sooner merchants will adopt procedures to improve their billing practices. There is a

law, and its waiting to be used!"

Consumer Reports replied on May 10, 1972 (31a-32a), asking the Plaintiff to keep it advised of his efforts to "invoke the $100 civil penalty on grounds of failure to itemize open-end purchases."

About that time, in May 1972 (and as is explained at 33a-36a), the Plaintiff commenced identification litigation against the issuers of four credit cards, three of whom were issuers of bank cards, and one (the Defendant) who was the issuer of a department store (two party) card. In view of the fact that banks have less control than department stores over the manner in which charge slips are filled in, the Plaintiff considered it important to have at least one department store among his defendants.

Furthermore, the Court is advised that in a deposition of the Plaintiff on March 15, 1973 [more than a year before the District Court questioned White's motive as a "private attorney general"[7], Central Charge explored the Plaintiff's

motivations carefully. Pages 37a-39a, consisting of pages 33 through 36 of that deposition, deal with the foregoing matters. [4/]

* * *

If White were prosecuting this and the other lawsuits for the purpose of generating attorney's fees, as Arlen contends, certainly he would have maintained records from the beginning to justify the fees claimed. But, as the District Court found (Pet. at 20a), White "did not keep time records because he was not focusing on supplying a justification for legal fees". White began to keep time records in January 1974 (and at that time estimated his prior time expended in this litigation) because Arlen failed to perform under a discovery stipulation (Pet. at 7) and began to waste the time of White and the District Court, and White decided to ask for compensation for all

4/ This argument and the supporting evidence has been in the record since April 26, 1974, and has never been refuted by Arlen.

of his time. And it was in mid-1974 that White asked the United States District Court for the District of Columbia for an attorney's fee in Lynn. Indeed, the only attorney's fee he has ever received under the Truth in Lending Act is the $100 in Lynn. And White respectfully submits that the only conclusion that can be drawn from the record is that he has been serving as a bona fide "private attorney general".

2. White Did Not Have Bona Fide Legal Representation in the District Court

In the asterisked note at 7, Arlen is misrepresenting White's argument. White did not move to alter or amend the judgment by increasing the $750 to $4,000, as stated. Steven A. Skalet, Esquire, who was supposed to be representing White's interest, argued in support of that motion:

> Even if the Court were to find that only 100 hours were reasonably necessary to pursue this claim, plaintiff submits that an award in the amount of $4,000.00 based upon the modest hourly rate of $40.00 an hour, would be reasonable under the circumstances for

plaintiff's pro se representation.

And when White took back the reins of this litigation (Pet. at 13-14), he did not state to the Court of Appeals that $6,000 would be "tentatively reasonable". He argued to the Court of Appeals:

> Since attorneys' fees are the property of litigants, and not their counsel (2/25/77 transcript, page 22), any disposition of an attorney's fee is a disposition of a portion of the litigation which requires the litigant's consent. The Plaintiff did nothing to hold Mr. Skalet out as having authority to settle any portion of this litigation without his (the Plaintiff's) knowledge and consent. And while an attorney has implied authority to take many actions on behalf of his client, he does not have implied authority to settle any portion of his client's litigation. DR 5-107 of the Code of Professional Responsibility provides, in this connection,
>
> "(A) Except with the consent of his client after full disclosure, a lawyer shall not:
> "(1) Accept compensation for his legal services from one other than his client."

The Plaintiff submits that the stipulation herein equated to an acceptance by Mr. Skalet of a legal fee from the Defendant.

There is an inherent conflict of interest in Mr. Skalet's action which the Plaintiff will demonstrate through figures. We will assume that a fee of $4,000, as stipulated by the

Defendant, which is about $45 per hour, is tentatively reasonable for Mr. Skalet's 90 hours. We will also assume that a fee of $6,000, which equates to about $31.50 per hour for the Plaintiff's 190 hours, is also tentatively reasonable. But if a court should find that the total resulting fee of $10,000 would be excessive under all of the circumstances, and if one part of that fee (the $4,000) is fixed by stipulation, then the court could reduce the total fee only by reducing the part which is not fixed by stipulation (the $6,000).

Certainly, the foregoing inherent conflict crossed Judge Harvey's mind when he said (oral opinion, page 7) /Pet. at 10a/,

> "The Plaintiff seeks $7,800 as a fee for his services performed at or prior to trial. With the $4,000 for the appeal, this would come to a total fee in this case of $11,800."

White has not been able to ascertain the details of the Stipulation either from Skalet or from Arlen's counsel, Joel M. Wolosky, Esquire. The Petition for Allowance of Attorney's Fees and Costs was prepared by Skalet and served on Arlen on December 16, 1976, and states,

> The parties have already agreed that counsel on appeal should receive an award of attorneys fees in the amount of $4,000.00 for his legal services following the decision in this Court.

But a copy of that Petition was not furnished to White (until after February 25, 1977).

Arlen, in its opposition filed January 31, 1977, denied that there was such an agreement, and said that $4,000 would be excessive because Skalet was retained by White after all

> . . . research of relevant legal issues had been completed by plaintiff acting pro se.

But -- although White's name and address continued to appear on the docket sheet to receive service copies of filings -- Arlen did not serve a copy of its opposition on White. As a result, White did not become aware of the fact that Skalet and Wolosky were actively negotiating a dollar amount for Skalet's services.

As appears from the copy of the Stipulation in White's petition at 25a, in the lower left corner, the Stipulation was prepared by Skalet's office. And as appears from the fact that "$4,000.00" is typed into the Stipulation, the amount had been agreed to when the Stipulation

was typed. Thus, when Skalet appeared in court on February 25, 1977, purportedly to obtain the best fee possible for White, the Stipulation for the $4,000 was an accomplished fact that required only the approval of the District Court. Skalet obviously would do and say nothing that would diminish his own image and enhance White's image to the District Court, and thus jeopardize the amount of the fee agreed with Wolosky.

And the District Court played along. Although the District Court inquired into the number of hours expended by Skalet and the hourly rate justifying the $4,000, it did not fix an allowable hourly rate or number of hours for White. Instead, the District Court sought to justify the obvious inadequacy of the $750 on the grounds (1) that White's performance as an attorney was poor (Pet. at 13a), and (2) that White's motive as a litigant was "suspect" (Pet. at 12a-13a). Contrary to Arlen's claim (at 8), the "sordid details" of White's relationship with Skalet are

relevant and material, first, because those details include Skalet's unholy alliance with Wolosky, and second, because that secret alliance resulted in White's failure to have bona fide legal representation at the hearing at which a purportedly "reasonable" attorney's fee was fixed for White's services. 5/

White's non-taxable expenses far exceed the $100 statutory penalty awarded him. Some of them would have been "overhead" expenses of his attorney, if he had one, which would have been recovered by his attorney as part of the fee; and some would have been and were recovered through out-of-pocket billings to White. Attorney-or-no, White

5/ Furthermore, in counter-stating the "Questions Presented" (at 2), Arlen says that White "expressly asked the court of appeals to examine the propriety of the district court's award of an attorney's fee for his pro se representation in this action". White could not have challenged the "propriety" of the award (as stated at 2 and 6) because he was not aggrieved by the fact that the District Court entered an award in his favor. Instead, White challenged the reasonableness of the award (as quoted at 6) because he was aggrieved by its inadequacy.

must be awarded an attorney's fee for his own services if a financial deficit is to be avoided and if private enforcement of the Truth in Lending is to be encouraged.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit. The petitioner respectfully suggests that the Court summarily reverse that judgment and remand the case to the Court of Appeals with instructions to promptly decide the issues that are properly before the Court of Appeals respecting the reasonableness of the sum of money in question.

Respectfully submitted,

ALAN J. WHITE
8201 Snug Hill Lane
Potomac, MD 20854

Petitioner, in propria persona

LETTER PUBLISHED IN MAY 1972 CONSUMER REPORTS

Undescriptive billing

For many years, my wife and I have had charge accounts at a dozen or so retail establishments in our area, being billed monthly for purchases made since the last billing. In the past, we have always been provided, along with the bill, with copies of sales slips showing some sort of evidence that it was indeed we who made the purchases billed and that the prices quoted were correct. Usually such evidence takes the form of my signature or my wife's, or of an impression from a charge-plate kept in our possession.

But within the past month, two retail establishments (The Star Store of New Bedford and Jordan Marsh of Boston) have suddenly stopped enclosing sales-slip-carbons with their monthly bills. In the case of Jordan Marsh, the bad business practice is even worse: Not only does Jordan's fail to provide evidence of purchase, but it now doesn't even itemize bills. That is, my latest (and last) bill had a single entry for "Girl's Apparel" in the amount of $55. My wife bought two or three things for my daughter some time ago, but can't remember the prices; all she knows is that we simply couldn't afford to spend that much for a single item of clothing for a rapidly-growing child. How, therefore, am I to know that a wrong price hasn't been quoted, or that somebody else hasn't charged a purchase to our accounts? If I refused to pay, alleging that the purchases weren't demonstrably made, no doubt the stores in question could shoot me down by producing their copies of the evidence; so I've paid but cancelled both accounts, resolving not to shop at either store again, even for cash.

Shouldn't retailers itemize each separate item when billing? There oughta be a law!
Marion, Mass. R.H.R.

CONSUMERS UNION'S REPLY

The trend is nationwide. In creditor circles the old-fashioned practice of enclosing sales slips and itemizing them briefly on the bill is called country-club billing, implying some sort of luxury. The enigmatic practice of listing only a classification such as "furniture" or "girl's apparel" -- or, worse, a code number referring to a list of departments on the back of the bill -- is misnamed "descriptive billing." Stores and credit-card companies make the switch in billing methods in the name of efficiency or computerization. The Truth-in-Lending Act lets them get away with it. Senator William Proxmire's Fair Credit Billing Act would have required monthly bills to include a brief identification of each purchase but not a copy of the sales slip. This legislation, which also deals with many other charge-account problems, was severely weakened in committee before reaching the Senate floor late in March.

2700 Calgary Avenue
Kensington, Md. 20795
April 25, 1972

Consumer Reports
P.O. Box 1111
Mt. Vernon, N.Y. 10550

Gentlemen:

Your apathetic reply to R.H.R.'s complaint on undescriptive billing (Consumer Reports, May 1972) was unbecoming to C.U. Contrary to your assertion, there is a law!

The Truth in Lending Act requires periodic billing statements to contain "a brief identification (unless previously furnished) of the goods or services purchased." Consequently, if R.H.R. or his wife received an itemized sales slip at the time of their purchase, the merchant's billing statement to them did not have to identify the goods or services purchased. In that event, if they did not retain their sales slip, they have no one to blame but themselves. [*/]

But where identification has not been previously furnished, the Federal Reserve Board's Regulation Z permits identification to be made "on a separate statement or separate slips which shall accompany the periodic statement and identify each charge and credit" or, alternatively, "by symbol relating to an identification list printed on the statement." Its Regulation Z pamphlet suggests that "a listing of all departments and a brief description of the merchandise sold in each" would be sufficient identification, such as "Men's Accessories (Shirts, Ties, Socks, etc.)" and

*/ White's position changed in this respect after reading the legislative history.

"Men's Clothing (Suits, Sportcoats, Outerwear, etc.)." Although the pamphlet does not so state, it can be argued from the Federal Reserve Board's example that the identification mentioned by R.H.R., "'Girl's Apparel'", without more, would be insufficient for compliance, particularly since the following appears in the same pamphlet:

> "Q: What sort of information must accompany a monthly statement?
>
> "A: Where applicable, you must give customers this information: . . . 2. The amount and date of each extension of credit and identification of <u>each item bought</u> /Emphasis added/. . . .

The Truth in Lending Act also provides that "any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required . . . to be disclosed to that person is liable to that person" in a minimum amount of $100 plus "in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court." Although small claims courts should be ideal for enforcing such liability, the judges of such courts may require education in this field, and such task is better performed by an attorney than attempted by a layman.

I would venture that in the final analysis an identification would comply with the Truth in Lending Act if it would cause an ordinary prudent person to recall the item or items purchased and, consequently, I would assume that sufficiency of identification would vary from merchant to merchant and according to price and other factors. And I would like to thank R.H.R. and C.U., for together you caused me to review my billing statements and find numerous charge slips either containing no identification whatsoever or identifying purchases as "merchandise", for which

I intend to seek redress. You also caused me to realize that the sooner consumers cause merchants to respond to such civil liability, and the more widespread, the sooner merchants will adopt procedures to improve their billing practices. There is a law, and it's waiting to be used!

Very truly yours,

/s/Alan J. White
Alan J. White

CONSUMERS UNION LETTERHEAD

May 10, 1972

Mr. Alan J. White
2700 Calgary Avenue
Kensington, Md. 20795

Dear Mr. White:

I'm sorry you found our comment to R.H.R.'s letter apathetic. As it happens, I serve as a consumer member of the Federal Reserve Board's Truth in Lending Advisory Committee. This has given me quite a good opportunity to become familiar with Regulation Z, its intentions and its interpretations. Senator Proxmire, as a sponsor of the legislation, also has some familiarity with it. He and his staff believe, as we do, that the law needs strengthening in several particulars, one of which is § 127(b)(2) requiring periodic disclosure in open-end credit of "The amount and date of each extension of credit during the period, and, if a purchase was involved, a brief identification (unless previously furnished) of the goods or services purchased." As the very least, the creditor should have to itemize the charges.

Much trouble would be saved the public, and much money as well, I think, if the bill had to include sales vouchers. Many people have written to us of their experience with gasoline company credit billings. If their experiences mean anything, it is not uncommon for a filling station attendant to run off two bills with a customer's credit card. The second bill is forged to the attendant's benefit. On the monthly bill the forged charge looks like just another purchase of gasoline to someone who is not alert and who has not been careful to preserve all of his

purchase receipts. Mis-billings of general credit card accounts are also reported. Enclosure of voucher copies for each purchase makes possible the relatively easy detection of false billings.

All of that having been said, we will be very interested in any legal effort you might attempt to invoke the $100 civil penalty on grounds of failure to itemize open-end purchases. Would you be kind enought to keep us informed?

With best wishes,

/s/ Robert J. Klein
Robert J. Klein
Economics Editor

2700 Calgary Avenue
Kensington, Md. 20795
September 8, 1972

Mr. Robert J. Klein
Economics Editor
Consumers Union
256 Washington Street
Mt. Vernon, New York 10550

Dear Mr. Klein:

In your letter dated May 10, 1972, you asked me to keep you informed of my efforts to invoke the civil liability provision of the Truth in Lending Act in connection with failures to identify purchases charged under open end credit plans. My failure to respond earlier, as I had fully intended, was the result of over-activity rather than inaction.

I filed my first such suit on May 2, 1972, against Central Charge Service, Inc., a subsidiary of Riggs National Bank, in the Small Claims and Conciliation Branch of the Superior Court of the District of Columbia, claiming that identification of goods as "merchandise" in one instance, and "general merchandise" in another, was insufficient. I filed the suit one year plus several days after the date of the billing statement containing the charges, so that I could safely testify that I filed the suit within one year after its receipt. Expectedly, Central Charge claimed that the one year period ran from the date of the purchase or the date of the billing statement -- but I now have a written opinion to the effect that it runs from the date of receipt of the billing statement. And against Central Charge's contention that the obligation to identify was that of the merchants who prepared the sales-charge slips, the opinion holds

that it was the obligation of Central Charge, the open end creditor. But the opinion also holds that the identification was sufficient because it was supplemented by cash register tape symbols, in one instance, and by the name of a department, in the other. The Court refused to give me permission to file a brief, so I sought review in the District of Columbia Court of Appeals. That was declined, and I sought reconsideration -- which is still pending.

In the meanwhile I developed a form of Complaint, reviewed my billing statements for the preceding twelve months, and filed lawsuits in Federal district courts against the principal offendors, namely, Central Charge Service, Inc. (13 additional identification counts), Virginia National Bank (Master Charge, 11 counts), Suburban Trust Company (BankAmericard, 20 counts) and Arlen Realty and Development Corp. (Korvettes, 12 counts). These kept me so busy that when Virginia National Bank recently offered to settle for $100 per count plus my costs, I decided to accept. A copy of the Complaint in that action is enclosed for your information.

I have concluded from my experiences thus far that a layman should not attempt such an action alone, not even in a small claims court. I have also concluded that an action under Section 130(a) is extraordinarily easy to prove if one has retained his sales-charge slips and billing statement. And I have concluded that such an action is financially impracticable to defend -- for even if the Section 130(c) hurdle of "intent" is proved by a preponderance (not greater weight) of the evidence, a defending bank may have to prove not only that it maintained procedures, but that other banks also maintained procedures.

I have encountered defenses based on negligence and breach of contract principles -- that I should have ascertained that the sales-charge slips were properly prepared. I think that such defense should fail, first, because the statutory defenses are exclusive, and second, because the concept of creditor responsibility underlies the Truth in Lending Act.

Aside from the foregoing, promptly after Suburban Trust Company was served with process, it informed me that it cancelled my BankAmericards. Since I have not been refused credit although I continued to use them, I suspect that in view of the Fair Credit Reporting Act it has not cancelled my cards but, instead, will refuse to renew them in October 1972. And during settlement negotiations, Virginia National Bank informed me that it would not renew my Master Charge cards in February 1973. Since my accounts have been perfect, I believe that such actions are unlawful insofar as they discourage utilization of the civil liability provision. I asked Mr. Garwood [of the Federal Reserve Board], whom I'm sure you know, for an amendment of Regulation Z to prevent such cancellation or non-renewals, but he informed me that in staff's opinion it would be outside the scope of Section 105.

Since you are a member of the Federal Reserve Board's Truth in Lending Advisory Committee, I'm wondering whether you would be inclined to take this up with the Board. Retribution must be prohibited if Section 130(a) is to become an effective enforcement vehicle. And absent prompt assistance from the Board, I'm inclined to tie down the reasons for cancellation or non-renewal through discovery proceedings and bring a motion in court for ancilliary relief in the form of a permanent

injunction.

Very truly yours,

/s/Alan J. White
Alan J. White

EXCERPT FROM MARCH 15, 1973, DEPOSITION OF WHITE

Q At the time that you went to the Giant market on April 17, 1971, I want to explore with you your then familiarity with the provisions of the Truth in Lending Act.

A I object to this line of questions because I don't think my familiarity has anything to do with the litigation. I will answer the question.

Q Would you generally describe the nature of your familiarity as of April 17, 1971.

A It is extremely --

Q Let me ask you a precise question. As of the date you walked into the Giant Food store on April 17, 1971, were you of the view that the statute, meaning the Truth in Lending Act and the regulations promulgated in connection with the Act, required the merchants to give a brief identification of the goods and services purchased on the charge slip unless it was furnished by some alternative means?

A No. I had never been of that view.

Q What was your view with respect to identification of goods and services?

A Let me say this: The whole idea of identification giving rise to a cause of action did not occur to me until some time in the early part of 1972, shortly before I filed these lawsuits against Central Charge and against others. Now --

Q How did that occur to you?

A Okay. Something that I read in -- I read. I can't help it. You make a face. I will just say for the record that it is a coincidence that both ideas came to me through reading, but I do read. It was something that I had read in Consumers Report, and I can't give you an issue on that, but, in effect, it was one of those letters to the editor type of items where a person had complained that they didn't know that [whether] certain charges were there [theirs] because slips weren't enclosed with billing statements. I forget precisely what the gist of the reply was, but I recall that I disagreed with the Consumers Report reply and having at that time -- and I will call it March '72 just to put a date on it. I am not sure if that is so. Somehow I had my Truth in Lending Act material at home when I read that because of my prior litigation and I went to my material and I decided that the response that they had given in this answer was wrong. At that time, something had been triggered from my oral argument before the Court of Appeals.

Q In the Wheaton case?

A Yes. What I read and what I looked up on that particular day -- and I recall it was a Saturday at home as I was reading it -- something that I put together triggered something that occurred in the Court of Appeals in the Wheaton case. What had happened was that the Court of Appeals made me, while I was standing on my feet arguing, go down Section 127(b) of the Truth in Lending Act and asked me number by number [,] all those numbered items there, "Read this out loud and tell me whether you claim a violation of this," of that, and so forth, and I did. When I got to No. 2, somehow I stood there as if this was the first time that I had ever read that. Do you know how it is? Something dawns

on you for the first time. It was a traumatic experience. When I read this article in the Consumers Report and looked up some stuff about the Truth in Lending Act, I decided that identification was an area of claim. Okay? When you ask me whether in April 1971 I had that feeling, the answer is no, because I had never thought of identification as an area of claim in April 1971. I hope that is a fair answer to you.

Q You argued that case before the District of Columbia Court of Appeals sometime in the late fall of 1971; is that not correct? The opinion was dated December 29, 1971.

A Doesn't the argument /opinion/ state the date? It says it was argued October 29, 1971. I accept that as an accurate date. When I said I read this in the spring of 1972 in the Consumers Report, you can get the context that there must have been about a six-month difference in there.